

11-1-2006

## Appellate Review of Discovery Orders in Federal Court: A Suggested Approach for Handling Privilege Claims

Cassandra Burke Robertson

Follow this and additional works at: <https://digitalcommons.law.uw.edu/wlr>



Part of the [Civil Procedure Commons](#)

---

### Recommended Citation

Cassandra B. Robertson, *Appellate Review of Discovery Orders in Federal Court: A Suggested Approach for Handling Privilege Claims*, 81 Wash. L. Rev. 733 (2006).

Available at: <https://digitalcommons.law.uw.edu/wlr/vol81/iss4/3>

This Article is brought to you for free and open access by the Law Reviews and Journals at UW Law Digital Commons. It has been accepted for inclusion in Washington Law Review by an authorized editor of UW Law Digital Commons. For more information, please contact [cnyberg@uw.edu](mailto:cnyberg@uw.edu).

# APPELLATE REVIEW OF DISCOVERY ORDERS IN FEDERAL COURT: A SUGGESTED APPROACH FOR HANDLING PRIVILEGE CLAIMS

Cassandra Burke Robertson\*

*Abstract:* The federal circuit courts of appeals have generally recognized that a party suffers real hardship when the district court erroneously orders it to disclose privileged information. Review of the disclosure order after final judgment is usually an insufficient remedy; once the information has been disclosed, it can never again be fully confidential. Consequently, the courts have struggled to provide a mechanism by which such orders can be immediately appealed. However, privilege orders presenting novel questions of law or issues of first impression do not clearly fit within the doctrinal requirements of the most common methods of interlocutory review. Appellate courts have therefore applied varying exceptions or extensions to those requirements in an effort to encompass such privilege orders within them.

This Article proposes a two-tiered system of review to remedy the harm caused by erroneous disclosure orders without stretching the current system of interlocutory review so far that the benefits of the final judgment rule vanish. The Article recommends that review begin in the district court with a motion to certify a discretionary appeal under 28 U.S.C. § 1292(b), which requires a district court to certify an order that “involves a controlling question of law as to which there is substantial ground for difference of opinion,” if “an immediate appeal from the order may materially advance the ultimate termination of the litigation.” If a district court refuses to certify an order even though it clearly satisfies the requirements of § 1292(b), then the appellate court should exercise its mandamus power to review the case. This two-tiered system of review would provide a consistent mechanism by which the most difficult and important privilege orders could be immediately reviewed, but would not impose too heavy a burden on the already-crowded appellate dockets.

|   |     |
|---|-----|
| INTRODUCTION .....  | 734 |
| I. THE FINAL JUDGMENT RULE .....  | 737 |
| II. VARIED METHODS OF APPELLATE REVIEW .....                                    | 741 |
| A. Litigation Sanctions .....   | 742 |
| B. Discretionary Appeal .....   | 744 |
| C. The <i>Cohen</i> Collateral Order Doctrine .....                             | 746 |
| D. Mandamus .....   | 750 |
| 1. Circuits are Split as to the “Extraordinariness” of<br>Privilege Cases ..... | 752 |

---

\* Staff Attorney, Supreme Court of Texas, Austin, Texas. J.D., University of Texas School of Law, 2002; M.P.Aff., LBJ School of Public Affairs, University of Texas, 1998; B.A., University of Washington, Seattle, 1993. I thank Elizabeth (Ginger) Rodd and Jody Hughes for comments on earlier drafts of this article, and I thank Steve Gillespie, Travis Exstrom, and the members of the Washington Law Review for their thorough editing and thoughtful advice.

|  |     |
|--|-----|
| 2. Courts Disagree Over the Degree of Error Necessary<br>for Mandamus Relief .....                             | 755 |
| E. Summary .....   | 758 |
| III. PROBLEMS CAUSED BY THE CIRCUIT SPLIT .....  | 759 |
| A. Litigation Sanctions Are an Unreliable Method for<br>Obtaining Review .....                                 | 760 |
| B. Unavailability of Review Through Discretionary<br>Appeals .....   | 761 |
| C. Civil Cases Are Often Unable to Meet the Requirements<br>of the <i>Cohen</i> Collateral Order Doctrine..... | 763 |
| 1. Privilege Issues in Civil Cases Are Inseparable from<br>the Merits .....                                    | 764 |
| 2. Application of the <i>Cohen</i> Doctrine in Criminal<br>Cases .....   | 766 |
| D. Limitations of Mandamus Review .....  | 769 |
| E. Summary .....   | 770 |
| IV. STRENGTHS AND WEAKNESSES OF PROPOSED<br>STATUTE OR RULE CHANGES.....                                       | 770 |
| A. Additional Appeals as of Right .....  | 771 |
| B. Lodging Discretionary Review in the Circuit Courts.....   | 773 |
| C. Combining Categorization with Discretion.....   | 776 |
| D. Summary .....   | 777 |
| V. THE POSSIBILITY OF GREATER UNIFORMITY UNDER<br>THE CURRENT RULES AND STATUTORY SCHEME.....                  | 777 |
| A. Enforcing § 1292(b) Through Mandamus Review.....  | 779 |
| B. Advantages of Two-Tiered Review Combining a<br>§ 1292(b) Appeal with Mandamus Review .....                  | 782 |
| 1. Reducing Reliance on Inconsistent Appellate<br>Remedies.....  | 782 |
| 2. Minimizing the Appellate Burden .....   | 783 |
| C. Limitations of Two-Tiered Review .....  | 784 |
| D. Summary .....   | 785 |
| CONCLUSION .....   | 786 |

## INTRODUCTION

Imagine that you are a litigant in a civil case. Your adversary requests discovery of some of your most sensitive information—your company's trade secrets, records of conversations with your attorney, even psychotherapy records. You assert a claim of privilege in an attempt to resist discovery,<sup>1</sup> but the district court orders you to disclose this

---

1. See FED. R. EVID. 501 (establishing privileged matters); FED. R. CIV. P. 26(b)(1) (allowing

information and even denies your request for a protective order. Complying with the disclosure order and waiting until after trial to appeal the discovery decision will not help you; once the information is made known, the damage is done. What do you do?

In many state courts, the answer is easy—you probably have a right either to make an interlocutory appeal or to seek immediate review by mandamus.<sup>2</sup> In federal court, the answer is much more difficult. The circuit courts are deeply split on the question of what—if any—type of interlocutory review should be available to challenge an order requiring the discovery of allegedly privileged information. Some courts require you to disobey the order, stand in contempt of court and, if the court issues a criminal contempt order, challenge the discovery ruling in an appeal of the contempt order.<sup>3</sup> Other courts allow you to file a discretionary appeal, but only if you are one of the lucky few who can persuade the district court and the circuit court to agree that your case merits that appeal.<sup>4</sup> Still other courts allow you to file an appeal as of right under the collateral order doctrine, if your case meets certain requirements.<sup>5</sup> Finally, some courts might be willing to exercise their authority to issue a writ of mandamus.<sup>6</sup>

---

parties to “obtain discovery regarding any matter, not privileged, that is relevant to the claim or defense of any party”). Although trade secrets are not technically considered to be privileged, they may still be exempted from discovery and therefore are included within the scope of this paper. *See* Fed. Open Mkt. Comm. of the Fed. Reserve Sys. v. Merrill, 443 U.S. 340, 362 (1979); *see also* Powers v. Chi. Transit Auth., 846 F.2d 1139, 1143 (7th Cir. 1988) (“District courts have a responsibility to protect sensitive information in discovery, where the utility of that information is less than the injury its disclosure may do, even if the information is not technically privileged.”).

2. 8 CHARLES ALAN WRIGHT, ARTHUR R. MILLER & RICHARD L. MARCUS, *FEDERAL PRACTICE AND PROCEDURE* (2d ed. 1994) § 2006 [hereinafter *FEDERAL PRACTICE*] (noting that many states allow mandamus review of discovery orders); Michael P. Shea & Alfred W.J. Marks, *Life Without Interlocutory Relief*, N.Y.L.J., Oct. 11, 2005, at S4 (Special Litigation Pullout Section) (noting that New York allows an interlocutory appeal of discovery orders); *see also, e.g., Ex parte Miltope Corp.*, 823 So. 2d 640, 644–45 (Ala. 2001) (“If a trial court orders the discovery of trade secrets and such are disclosed, the party resisting discovery will have no adequate remedy on appeal.”); *State ex rel. Or. Health Scis. Univ. v. Haas*, 942 P.2d 261, 264 (Or. 1997) (“Mandamus is an appropriate remedy when a discovery order erroneously requires disclosure of a privileged communication.”); *In re Living Ctrs. of Tex., Inc.*, 175 S.W.3d 253, 262 (Tex. 2005) (granting a writ of mandamus to correct an erroneous privilege determination).

3. *See, e.g., Church of Scientology of Cal. v. United States*, 506 U.S. 9, 18 (1992); *see also infra* Part II.A.

4. *See, e.g., Katz v. Carte Blanche Corp.*, 496 F.2d 747, 755 (3d Cir. 1974); *see also infra* Part II.B.

5. *See, e.g., Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546–47 (1949) (permitting review of interlocutory rulings that “finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause

With regard to mandamus proceedings—the most common vehicle for immediate review—the circuits are divided on the requirements necessary to obtain such review. Some courts have held that privilege determinations can be reviewed by mandamus only in truly extraordinary cases,<sup>7</sup> while other courts have held that mandamus review should be available whenever delayed review of a privilege ruling would cause irreparable harm.<sup>8</sup> Similarly, when a case presents a privilege question of first impression, the courts are split as to whether, in a mandamus proceeding, they can apply an “ordinary error” standard of review or whether they must apply the traditional “clear abuse of discretion” test.<sup>9</sup>

Given these inconsistencies, it is not surprising that some courts, frustrated with the current scheme, have expressed a desire for greater uniformity. The Seventh Circuit, for example, has written that “[a]ppellate approaches to this topic are now so disparate that only Congress or the Supreme Court could clear the air.”<sup>10</sup> Other courts have similarly noted the inconsistent approaches.<sup>11</sup>

This Article aims to provide an analytic framework by which the federal courts can review rulings that deny privilege claims with greater consistency. Part I describes the traditional “final judgment rule” and

---

itself to require that appellate consideration be deferred until the whole case is adjudicated”); *see also infra* Part II.C.

6. *See, e.g.,* Peck v. United States (*In re* United States), 397 F.3d 274, 283 (5th Cir. 2005) (“[T]his court, in accord with other circuits, has considered and issued writs of mandamus over discovery orders implicating privilege claims.”); *see also infra* Part II.D.

7. *See, e.g.,* Chase Manhattan Bank, N.A. v. Turner & Newall, PLC, 964 F.2d 159, 163 (2d Cir. 1992) (establishing a three-part test for mandamus review of discovery orders involving privilege claims); *In re* W.R. Grace & Co.-Conn., 984 F.2d 587, 589 (2d Cir. 1993) (disagreeing with the assertion that “even an erroneous application of the [common-interest] doctrine, if such should occur, poses a significant risk of undermining the privilege”); *see also infra* Part II.D.1.

8. *See, e.g.,* Rhone-Poulenc Rorer v. Home Indem. Co., 32 F.3d 851, 861 (3d Cir. 1994) (holding that mandamus is appropriate when a party can show that the district court has made a “clear and indisputable” error in its privilege determination and can show that no other relief is available to correct the harm caused by the erroneous order); *see also infra* Part II.D.1.

9. *Compare* Republic of Venez. v. Philip Morris Inc., 287 F.3d 192, 198 (D.C. Cir. 2002) (“[N]o writ of mandamus—whether denominated ‘advisory,’ ‘supervisory,’ or otherwise—will issue unless the petitioner shows . . . that the writ is necessary to amend a clear error or abuse of discretion.”) *with In re* Cement Antitrust Litig., 688 F.2d 1297, 1307 (9th Cir. 1982) (“[W]e have some doubt that the district court’s order need be ‘clearly’ erroneous in supervisory mandamus cases where the petition raises an important question of law of first impression, the answer to which would have a substantial impact on the administration of the district courts.”); *see also infra* Part II.D.2.

10. *Burden-Meeks v. Welch*, 319 F.3d 897, 901 (7th Cir. 2003).

11. *See infra* Part II.

explains why the rule causes particular hardship in cases involving questions of privilege. Part II outlines some of the conflicting approaches the circuit courts use to ameliorate the harm caused by a strict application of the final judgment rule. Part II further looks at the current methods of interlocutory review, including review of litigation sanctions, discretionary appeals, the *Cohen* collateral order doctrine, and mandamus review. Part III discusses the problems caused by this circuit split and analyzes the shortcomings of each of the current methods of appellate review identified in Part II. Part IV describes some of the statutory and rule changes recommended by other authors, including proposals to increase the number of interlocutory appeals allowed as of right, to provide appellate courts with greater discretion in determining which appeals to allow, or to adopt a combination of those two approaches. Part IV concludes that these changes would not provide either an effective or an efficient method for handling appeals of privilege denials. Finally, Part V recommends that privilege cases involving novel questions of law—the cases that the current system has the most trouble handling—be addressed through a two-step procedure that combines discretionary appeal with mandamus review. It analyzes both the advantages and limitations of that two-step approach, and concludes that the two-step approach is better than current procedures at meeting the appellate goals of error correction, uniformity, and fairness.

## I. THE FINAL JUDGMENT RULE

Application of the final judgment rule, which defers appellate review until the trial court has fully finished considering a case, prevents immediate review of pre-trial and in-trial rulings.<sup>12</sup> Consequently, most appeals do not begin until the trial court has fully completed its involvement in a case.<sup>13</sup> With a few exceptions,<sup>14</sup> federal circuit courts

---

12. 28 U.S.C. § 1291 (2000).

13. *Id.* (“The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States . . . except where a direct review may be had in the Supreme Court.”).

14. Exceptions to the final judgment rule allow the appeal of interlocutory decisions granting or denying an injunction, appointing a receiver, determining parties’ rights in certain admiralty cases, or certifying or refusing to certify a class action. *See id.* § 1292(a)(1), (2), and (3); FED. R. CIV. P. 23(f) (“A court of appeals may in its discretion permit an appeal from an order of a district court granting or denying class action certification under this rule if application is made to it within ten days after entry of the order.”). Additionally, in multi-party or multi-claim cases, a district court may sever a party or claim from the case to allow immediate appeal of a final judgment as to that party or claim. FED. R. CIV. P. 54(b) (“When more than one claim for relief is presented in an

of appeals may not review a case until the district court has reached a "final decision,"<sup>15</sup> defined as a ruling that "ends the litigation on the merits and leaves nothing for the court to do but execute the judgment."<sup>16</sup>

The final judgment rule offers a number of benefits. By denying piecemeal appeals, it can speed the resolution of a case, and it can reduce the opportunity for litigants to harass their adversaries through the use of repeated appeals of interlocutory rulings.<sup>17</sup> In addition, the rule avoids some unnecessary appeals, since a party who loses an interlocutory ruling but ultimately prevails in the case will ordinarily have no need to appeal.<sup>18</sup> Likewise, the rule protects appellate court dockets from being inundated with "housekeeping" matters from the district courts,<sup>19</sup> and "enables the reviewing court to consider the trial court's action in light of the entire proceedings below."<sup>20</sup> Finally, the rule may even hasten the parties' acceptance of an inevitable result.<sup>21</sup>

Although these benefits are substantial, the final judgment rule also possesses some significant detriments with regard to discovery orders

---

action, whether as a claim, counterclaim, cross-claim, or third-party claim, or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment." Other exceptions that may allow a court to review privilege claims are discussed *infra*, Part II.

15. See § 1291.

16. *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 467 (1978) (quoting *Catlin v. United States*, 324 U.S. 229, 233 (1945)).

17. *Cobbledick v. United States*, 309 U.S. 323, 325 (1940). The Court stated that the final judgment rule "avoid[s] the obstruction to just claims that would come from permitting the harassment and cost of a succession of separate appeals from the various rulings to which a litigation may give rise, from its initiation to entry of judgment." *Id.* The Court concluded: "To be effective, judicial administration must not be leaden-footed. Its momentum would be arrested by permitting separate reviews of the component elements in a unified cause." *Id.*

18. See *Am. Express Warehousing, Ltd. v. Transamerica Ins. Co.*, 380 F.2d 277, 280 (2d Cir. 1967).

19. *Id.*

20. Randall J. Turk, Note, *Toward a More Rational Final Judgment Rule: A Proposal to Amend 28 U.S.C. §1292*, 67 GEO. L.J. 1025, 1026 (1979).

21. Maurice Rosenberg, *Judicial Discretion of the Trial Court, Viewed From Above*, 22 SYRACUSE L. REV. 635, 661 (1971). Rosenberg noted that a "hands off" policy of prohibiting interlocutory review promotes finality, so that the adjudication "becomes accepted and the dispute tranquilized" sooner. *Id.* By contrast, "[i]f every trial court order could be dragged up the appellate ladder with some fair hope of reversal," termination of the dispute would be delayed. *Id.* at 662. Injustice could also result if "the party with the deeper pocket" tried to wear down the opposing party "by challenging every uncongenial ruling, whether made in the pleading, discovery, trial or post-trial phases of the litigation." *Id.*

involving claims of privilege. Because a party generally must wait until the case is over before seeking review of pretrial discovery rulings,<sup>22</sup> it can be difficult to obtain relief from an erroneous privilege ruling. For example, if a district court judge erroneously rules that information is not privileged—and therefore erroneously orders disclosure during discovery—a party’s compliance with that order may render the discovery dispute moot and preclude a later appeal.<sup>23</sup> Even if ancillary questions prevent the privilege question itself from becoming moot, and thus allow review of the privilege issue on appeal,<sup>24</sup> the appellate court usually will not be able to rectify all of the harm caused by the original erroneous discovery order. As the Fifth Circuit has pointed out, privileges protect against both the disclosure of private information and the use of that information in litigation.<sup>25</sup> If the district court incorrectly rules that information is not privileged, full relief will be unavailable after trial. Consequently, while the appellate court can require a new trial in which the information is not used, the privileged material will have already been disclosed and will no longer be fully confidential—“the cat is out of the bag.”<sup>26</sup>

Such disclosure can cause significant problems for parties. In one case, for example, the district court ordered disclosure of “in-house counsel’s legal memorandum advising [the client] on the merits of . . . contract and tort claims”;<sup>27</sup> because the attorney’s advice was made available to an adverse party, it was used against the client in subsequent litigation.<sup>28</sup> In addition to attorney-client confidences, the mere disclosure of other privileged or confidential information can also cause harm. Privacy is lost when medical records are disclosed,<sup>29</sup> military promotion policy can be undermined if confidential officer assessments are released to prospective candidates,<sup>30</sup> and a company’s

---

22. *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 467 (1978) (quoting *Catlin v. United States*, 324 U.S. 229, 233 (1945)).

23. See, e.g., *In re Grand Jury Subpoena*, 825 F.2d 231, 234 (9th Cir. 1987).

24. Even after trial, for example, a question may remain whether the allegedly privileged information should have been admitted into evidence. See 8 FEDERAL PRACTICE, *supra* note 2, § 2006.

25. *In re Avantel, S.A.*, 343 F.3d 311, 323–24 (5th Cir. 2003).

26. *In re Papandreou*, 139 F.3d 247, 251 (D.C. Cir. 1998).

27. *Am. Nat’l Bank & Trust Co. v. Equitable Life Assurance Soc’y*, 406 F.3d 867, 877 (7th Cir. 2005).

28. *Id.*

29. See *In re Sealed Case (Medical Records)*, 381 F.3d 1205, 1217 (D.C. Cir. 2004).

30. *In re England*, 375 F.3d 1169, 1178 (D.C. Cir. 2004) (“If board members knew that



competitive advantage could be lost if trade secrets were released to a competitor.<sup>31</sup> Even if available,<sup>32</sup> protective orders that prohibit disclosure outside of the lawsuit do not sufficiently protect the privilege interest.<sup>33</sup> Disclosure to a party's adversary can often cause significant harm, perhaps even the very harm that the privilege is designed to protect against.<sup>34</sup> Consequently, courts have noted that damage to confidential interests is done "by the disclosure itself," even if the privileged information is not used elsewhere or is later ruled inadmissible at trial.<sup>35</sup>

The inability to obtain full relief for erroneous privilege rulings does not sit well with the parties aggrieved by such rulings. Although the U.S. Supreme Court has held that constitutional due process does not provide a right of appeal,<sup>36</sup> parties' expectations of fairness and justice include the notion that erroneous rulings can—and will—be corrected on appeal.<sup>37</sup> Parties expect both fairness as to the merits of the case (i.e., "arriving at correct decisions") and fairness in procedure (i.e., "arriving at decisions correctly, in a manner that assures that litigants are, and feel they are, treated fairly").<sup>38</sup> Having the right to an appeal provides both; it

---

candidates passed over for promotion could gain access to board proceedings, that would clearly inhibit frank assessment of candidates' relative strengths and weaknesses.").

31. *Coca-Cola Bottling Co. v. Coca-Cola Co.*, 107 F.R.D. 288, 290 (D. Del. 1985).

32. FED. R. CIV. P. 26(c) ("[T]he court in which the action is pending . . . may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense . . .").

33. *See Coca-Cola*, 107 F.R.D. at 290.

34. *Id.* ("[D]isclosure of trade secrets in litigation, even with the use of an appropriate protective order, could 'become . . . the means of ruining an honest and profitable enterprise.'" (quoting 8 WIGMORE, EVIDENCE § 2212, at 155 (McNaughton rev. 1961))); *Chase Manhattan Bank, N.A. v. Turner & Newall, PLC*, 964 F.2d 159, 164 (2d Cir. 1992) ("In the case of the attorney-client privilege . . . a litigant claiming the privilege would probably prefer almost anyone other than adversary counsel to review the documents in question. The attorneys'-eyes-only condition simply does not limit disclosure to persons whose knowledge of the confidential communication is not material to the purpose of the privilege. To the contrary, it allows one kind of critical disclosure—to opposing counsel in litigation—that the privilege was designed to prevent.").

35. *In re Lott*, 424 F.3d 446, 451–52 (6th Cir. 2005) ("Mandatory disclosure of the communications is the exact harm the privilege is meant to guard against, and this disclosure is not remedied merely because a disclosed confidence is not used against the holder in a particular case."); *see also Chase Manhattan*, 964 F.2d at 163–64.

36. *Ohio ex rel. Bryant v. Akron Metro. Park Dist.*, 281 U.S. 74, 80 (1930) ("[T]he right of appeal is not essential to due process, provided that due process has already been accorded in the tribunal of first instance.").

37. Rosenberg, *supra* note 21, at 641–42.

38. Harlon Leigh Dalton, *Taking the Right to Appeal (More or Less) Seriously*, 95 YALE L.J. 62, 66–67 (1985).

gives appellate courts a second chance to get the merits of a case right, and it reassures litigants that their case has been thoroughly considered.<sup>39</sup> As a result, “the general right to press ahead most of the way to the top adds to, and in recent tradition has been considered a fundamental part of, the satisfaction that litigants are entitled to derive from the judicial process.”<sup>40</sup> By contrast, the concept of “unreviewable discretion”—the idea that the trial court’s ruling, even if wrong, will not be overturned—“offends a deep sense of fitness in our view of the administration of justice.”<sup>41</sup> The difficulty of obtaining appellate review of disclosure orders therefore conflicts with litigants’ basic sense of fairness and undermines societal trust in the judicial process.<sup>42</sup>

The final judgment rule therefore has both benefits and detriments. With regard to disclosure orders, the detriments generally outweigh the benefits. If a party is unable to secure interlocutory review and complies with the disclosure order, that compliance may render the issue moot and therefore unreviewable after final judgment. Furthermore, compliance with the disclosure order can cause substantial harm to the party giving up its confidential information. As a result, litigants may reasonably feel that the unavailability of interlocutory review creates a real injustice.

## II. VARIED METHODS OF APPELLATE REVIEW

Given the hardships caused by the final judgment rule in cases involving privilege claims, and given society’s expectation that erroneous decisions will be reversed on appeal, it is not surprising that appellate courts have frequently recognized a need to resolve privilege questions before a final judgment is entered. The Third Circuit, for example, has written that “[w]hen a district court orders production of information over a litigant’s claim of a privilege not to disclose, appeal after a final decision is an inadequate remedy . . . . [T]o delay review in

---

39. See, e.g., SCOTT BARCLAY, *AN APPEALING ACT: WHY PEOPLE APPEAL IN CIVIL CASES* 12 (1999) (conducting an empirical study of why people appeal, describing a “process-based approach” in which litigants appeal because they seek “to be heard fairly,” and concluding that a fair hearing may meet their appellate goals “even if the subsequent outcome is negative”).

40. Dalton, *supra* note 38, at 67–68.

41. Rosenberg, *supra* note 21, at 641–42.

42. Cf. Dalton, *supra* note 38, at 67 (“This appreciation of the value of participation is manifested in the appeals process as we hold ourselves ready to honor the litigant’s classic boast: ‘If need be, I’ll take this case all the way to the Supreme Court.’”).

such cases is to deny it altogether.”<sup>43</sup> Other circuits have agreed that appeal only after final judgment is inadequate in privilege cases.<sup>44</sup>

Even though the courts tend to agree that immediate review of privilege cases is desirable, they sharply diverge in how they provide that review. In some cases, a party must risk litigation sanctions in order to preserve a privilege claim.<sup>45</sup> In others, a party may seek review by pursuing a discretionary appeal under 28 U.S.C. § 1292(b).<sup>46</sup> Finally, some courts allow review either through the *Cohen* collateral order doctrine<sup>47</sup> or by mandamus proceedings.<sup>48</sup> The circuits, however, are sharply divided on the requirements for and availability of each of these review mechanisms.

### A. *Litigation Sanctions*

The oldest method of seeking immediate review of privilege determinations required that a party risk litigation sanctions.<sup>49</sup> A party who wanted to contest the district court’s order to disclose information would refuse to comply.<sup>50</sup> If the litigant was cited for criminal contempt, the contempt judgment could be immediately appealed,<sup>51</sup> and the court would review the privilege question when deciding whether contempt was an appropriate sanction.<sup>52</sup> Alternatively, if the court granted a default judgment as a discovery sanction, that judgment could also be appealed, and the appellate court would review the privilege determination in deciding whether the default judgment was warranted.<sup>53</sup>

---

43. *Bogosian v. Gulf Oil Corp.*, 738 F.2d 587, 591 (3d Cir. 1984).

44. *See, e.g., In re Sealed Case (Medical Records)*, 381 F.3d 1205, 1210 (D.C. Cir. 2004) (“As our prior cases have repeatedly noted, ‘appeal after final judgment is obviously not adequate in [privilege] cases—the cat is out of the bag.’” (alteration in original) (quoting *In re England*, 375 F.3d 1169, 1176 (D.C. Cir. 2004))); *see also Agster v. Maricopa County*, 422 F.3d 836, 839 (9th Cir. 2005); *Smith v. BIC Corp.*, 869 F.2d 194, 199 (3d Cir. 1989).

45. *See infra* Part II.A.

46. *See infra* Part II.B.

47. *See infra* Part II.C.

48. *See infra* Part II.D.

49. *See Alexander v. United States*, 201 U.S. 117, 121 (1906).

50. *Church of Scientology of Cal. v. United States*, 506 U.S. 9, 18 (1992).

51. *Id.*

52. *Id.*

53. *See United States v. Procter & Gamble Co.*, 356 U.S. 677, 681 (1958); *Newman v. Metro. Pier & Exposition Auth.*, 962 F.2d 589, 591 (7th Cir. 1992) (“A plaintiff’s failure to comply with discovery orders is properly sanctioned by dismissal of the suit, a defendant’s by entry of a default judgment.”); *Dole v. Local 1942, Int’l Bhd. of Elec. Workers*, 870 F.2d 368, 372 (7th Cir. 1989).

Conversely, if the district court denied discovery, a party could challenge a denial that resulted in dismissal of the case.<sup>54</sup> If plaintiffs could not prove their claims without using the allegedly privileged information, the district court might dismiss the case after refusing the discovery, and the appellate court could then review the privilege determination when the dismissal was appealed.<sup>55</sup> In some cases, however, a district court would sanction a party through civil contempt rather than criminal contempt.<sup>56</sup> Unlike a criminal contempt order, a civil contempt order is not immediately appealable,<sup>57</sup> so immediate review was therefore impossible even if a party was willing to risk contempt.

The circuits currently disagree about whether a party facing the possibility of civil contempt must still risk a contempt judgment in order to preserve a privilege claim.<sup>58</sup> Although the U.S. Supreme Court has stated that interlocutory review of discovery orders should generally be available only through contempt orders,<sup>59</sup> the Court has not addressed

---

54. *Clift v. United States*, 597 F.2d 826, 828 (2d Cir. 1979).

55. *Id.* (“Here the denial of the motion for discovery was the very basis for the order of dismissal and is thus reviewable.”).

56. A civil contempt order is designed to coerce compliance, while a criminal contempt order is designed to punish a party for non-compliance. *Shillitani v. United States*, 384 U.S. 364, 368 (1966). District courts are instructed to “first consider the feasibility of coercing testimony through the imposition of civil contempt,” and to “resort to criminal sanctions only after [the trial judge] determines, for good reason, that the civil remedy would be inappropriate.” *Id.* at 372 n.9.

57. *United States v. Philip Morris Inc.*, 314 F.3d 612, 620 (D.C. Cir. 2003).

58. *Compare id.* (allowing a collateral order appeal and noting that “we have expressed concern that a party that seeks review does not know in advance ‘whether refusal to comply with the discovery order will result in a civil contempt order or a criminal contempt order’”) with *In re State & County Mut. Fire Ins. Co.*, 138 F. App’x 539, 540 (4th Cir. 2005) (denying a writ of prohibition because “another avenue of relief appears to be available to State and County: it could refuse to comply with the May 6, 2005 Order and appeal from any contempt sanction imposed by the district court”).

59. *Church of Scientology of Cal. v. United States*, 506 U.S. 9, 18 n.11 (1992) (“A party that seeks to present an objection to a discovery order immediately to a court of appeals must refuse compliance, be held in contempt, and then appeal the contempt order.”). The U.S. Supreme Court has created two exceptions to this rule. It did not require the President of the United States to seek a contempt judgment in order to obtain review. *United States v. Nixon*, 418 U.S. 683, 691 (1974) (“[T]he traditional contempt avenue to immediate appeal is peculiarly inappropriate due to the unique setting in which the question arises. To require a President of the United States to place himself in the posture of disobeying an order of a court merely to trigger the procedural mechanism for review of the ruling would be unseemly, and would present an unnecessary occasion for constitutional confrontation between two branches of the Government.”). The Court has also created an exception for situations in which the discovery order is aimed at a party other than the party who claims the privilege. *Id.* (stating that the third-party exception was added because it was “unlikely that the third party would risk a contempt citation in order to allow immediate review of the

the issue of whether a party must risk civil, as well as criminal, contempt. Some circuit courts have suggested that the U.S. Supreme Court would not require a party to risk incurring a civil contempt judgment, as litigants are often powerless to control whether disobedience would lead to the issuance of an immediately appealable criminal contempt order or a non-appealable civil contempt order.<sup>60</sup> This view may be correct; the Court has stated in dicta that the contempt requirement may not apply when “denial of immediate review would render impossible any review whatsoever of an individual’s claims,”<sup>61</sup> as could be the case if the court entered a non-appealable civil contempt order. Other circuits, however, still require parties to refuse compliance and face litigation sanctions in order to protect an assertion of privilege.<sup>62</sup>

### *B. Discretionary Appeal*

In 1958, Congress added an additional method for obtaining interlocutory review in certain cases by enacting 28 U.S.C. § 1292(b).<sup>63</sup> This provision allows an interlocutory appeal to be taken in a civil case if both the district court and the appellate court agree that an interlocutory order meets several requirements:

When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals which would have jurisdiction of an appeal of such action may thereupon, in its discretion, permit an appeal to be taken from such order, if

---

appellant’s claim of privilege”).

60. *Philip Morris*, 314 F.3d at 620.

61. *Nixon*, 418 U.S. at 691 (quoting *United States v. Ryan*, 402 U.S. 530, 533 (1971)).

62. *E.g.*, *United States ex rel. Pogue v. Diabetes Treatment Ctrs. of Am., Inc.*, 444 F.3d 462, 474 (6th Cir. 2006) (“If HCA seeks to challenge the propriety of the district court’s order, it may disobey the order and suffer a contempt citation.”); *see also* *United States v. Procter & Gamble Co.*, 356 U.S. 677, 681 (1958); *In re State & County*, 138 F. App’x at 540; *Dole v. Local 1942, Int’l Bhd. of Elec. Workers*, 870 F.2d 368, 371 (7th Cir. 1989).

63. Pub. L. No. 85-919, 72 Stat. 1770 (1958) (amending 28 U.S.C. § 1292).

application is made to it within ten days after the entry of the order . . . .<sup>64</sup>

In theory, this provision looks as if it could solve the problem of interlocutory privilege rulings. A “controlling question of law” has generally been held to “encompass at the very least every order which, if erroneous, would be reversible error on final appeal.”<sup>65</sup> Even though a noted civil procedure treatise found it “difficult to believe that a discovery order will present a controlling question of law,”<sup>66</sup> many discovery orders have presented just such questions. For example, cases have addressed whether the corporate attorney-client privilege extends only to top-level management or whether it also extends to lower-level employees who seek legal guidance,<sup>67</sup> whether a habeas petitioner who asserts actual innocence must waive attorney-client privilege,<sup>68</sup> whether the names and addresses of patients in a hospital are protected medical records,<sup>69</sup> whether an invention record can constitute a “request for legal advice” so as to be protected by attorney-client privilege,<sup>70</sup> and whether a corporation can invoke attorney-client privilege against a stockholder.<sup>71</sup> Each of these determinations could affect the outcome of a case, and would therefore be at least theoretically appealable after final judgment—even though a reversal at that time might not fully cure the harm caused by the erroneous order.<sup>72</sup>

In those cases in which privilege claims do present a controlling issue of law, privilege issues are also likely to satisfy the remaining conditions of § 1292(b). Where there is a significant likelihood for reversal on appeal, there is also “substantial ground for difference of opinion.”<sup>73</sup> In

---

64. 28 U.S.C. § 1292(b) (2000).

65. *Katz v. Carte Blanche Corp.*, 496 F.2d 747, 755 (3d Cir. 1974); *see also Ex parte Tokio Marine & Fire Ins. Co.*, 322 F.2d 113, 115 (5th Cir. 1963). *But see United States v. Woodbury*, 263 F.2d 784, 787 (9th Cir. 1959) (holding that a privilege claim did not present a “controlling question of law” because the privilege issue did not go to the merits of the litigation and concluding instead that the “issues of this lawsuit and the ability of the court to render a binding decision therein are in no way affected by the order to produce documents”).

66. 8 FEDERAL PRACTICE, *supra* note 2, § 2006.

67. *See In re Avantel, S.A.*, 343 F.3d 311, 318 (5th Cir. 2003).

68. *See In re Lott*, 424 F.3d 446, 450–52 (6th Cir. 2005), *cert. denied sub nom. Houk v. Lott*, 126 S. Ct. 1772 (2006).

69. *See In re Fink*, 876 F.2d 84, 85 (11th Cir. 1989).

70. *See In re Spalding Sports Worldwide, Inc.*, 203 F.3d 800, 805–06 (Fed. Cir. 2000).

71. *See Garner v. Wolfenbarger*, 430 F.2d 1093, 1096–97 (5th Cir. 1970).

72. *See supra* notes 22–35 and accompanying text.

73. 28 U.S.C. § 1292(b) (2000); *see also Seven-Up Co. v. O-So Grape Co.*, 179 F. Supp. 167, 172

those cases, an interlocutory ruling is also likely to “advance the ultimate termination of the litigation.”<sup>74</sup> Sometimes a definitive ruling that key information is non-discoverable will result in immediate dismissal of the case.<sup>75</sup> Other times, even if the ruling does not result in dismissal, it may hasten the end of the litigation by reducing the risk that, if the privilege ruling were reversed on appeal, a second trial would need to be held.<sup>76</sup>

### C. *The Cohen Collateral Order Doctrine*

The *Cohen* collateral order doctrine permits review of interlocutory rulings that “finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated.”<sup>77</sup> An order that meets these requirements is treated as a final order,<sup>78</sup> so it is immediately appealable under 28 U.S.C. § 1291. Unlike discretionary appeals under § 1292(b), a § 1291 appeal does not depend on the willingness of either the trial or appellate courts to accept the case, but instead allows the aggrieved party to take an appeal as of right.<sup>79</sup> The U.S. Supreme Court has identified three requirements for an order to be eligible for an interlocutory appeal under *Cohen*: it must (1) “conclusively determine the disputed question,” (2) “resolve an important issue completely separate from the merits of the action,” and (3) be “effectively unreviewable on appeal from a final judgment.”<sup>80</sup>

The circuits are deeply split as to whether a party can use the collateral order doctrine to appeal disclosure orders at all. At this time,

---

(S.D. Ill.), *aff’d*, 283 F.2d 103 (7th Cir. 1959) (stating that the standard is “synonymous with a substantial likelihood that appellant’s position would prevail on appeal”).

74. 28 U.S.C. § 1292(b).

75. *See Garner*, 430 F.2d at 1096.

76. *See Reiser v. Residential Funding Corp.*, 380 F.3d 1027, 1029 (7th Cir. 2004) (noting that the advancement requirement is satisfied when a resolution of the legal question “could accelerate the disposition of many pieces of litigation”), *cert. denied*, 543 U.S. 1147 (2005); *In re Boise Cascade Sec. Litig.*, 420 F. Supp. 99, 105 (W.D. Wash. 1976) (noting that the advancement requirement is satisfied when an interlocutory ruling could avoid the need for a re-trial).

77. *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546–47 (1949); *see also Will v. Hallock*, 126 S. Ct. 952, 957 (2006).

78. *Cohen*, 337 U.S. at 546–47.

79. 28 U.S.C. § 1291 (2000) (providing that “[t]he courts of appeals . . . shall have jurisdiction of appeals from all final decisions of the district courts of the United States”).

80. *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468 (1978); *see also Sell v. United States*, 539 U.S. 166, 176 (2003) (quoting same text from *Coopers & Lybrand*).

the First, Second, Fourth, Fifth, Sixth, Seventh, and Tenth Circuits have held that such orders are not appealable under the *Cohen* collateral order doctrine.<sup>81</sup> On the other hand, the Third, Ninth, and D.C. Circuits have agreed that interlocutory orders addressing a claim of privilege can meet the *Cohen* requirements.<sup>82</sup> The Eighth Circuit has noted the disagreement without deciding whether it would allow an immediate appeal of a privilege ruling under *Cohen*.<sup>83</sup>

This circuit split is fairly recent. Before 1997, courts had generally disallowed interlocutory appeals of discovery determinations,<sup>84</sup> and any interlocutory appeal of a privilege order was therefore extremely rare. When it did occur, it tended to be in unusual situations, such as cases in which the allegedly privileged material was in the hands of a third party who had no incentive to risk a contempt judgment.<sup>85</sup>

In 1989, the Third Circuit was one of the first to suggest that a party could appeal discovery orders requiring the production of allegedly

---

81. See *FDIC v. Ogden Corp.*, 202 F.3d 454, 458–60 & n.2 (1st Cir. 2000); *Chase Manhattan Bank N.A. v. Turner & Newall, PLC*, 964 F.2d 159, 162–63 (2d Cir. 1992); *Peck v. United States* (*In re United States*), 680 F.2d 9, 11 (2d Cir. 1982) (“The assertion of a privilege . . . does not convert what would otherwise be an interlocutory discovery ruling . . . into a collateral, and therefore appealable, order.”); *United States v. Moussaoui*, 333 F.3d 509, 515 (4th Cir. 2003); *MDK, Inc. v. Mike’s Train House, Inc.*, 27 F.3d 116, 120 n.2 (4th Cir. 1994); *Texaco, Inc. v. Louisiana Land & Exploration Co.*, 995 F.2d 43, 44 (5th Cir. 1993); *In re Lott*, 424 F.3d 446, 448 n.2 (6th Cir. 2005), *cert. denied sub nom. Houk v. Lott*, 126 S. Ct. 1772 (2006) (observing that mandamus is “more appropriate” than the collateral order doctrine to review interlocutory privilege rulings but not directly ruling on whether a particular privilege order could be collateral); *Dellwood Farms, Inc. v. Cargill, Inc.*, 128 F.3d 1122, 1125 (7th Cir. 1997) (“[A] discovery order is not deemed collateral even if it is an order denying a claim of privilege.”); *Boughton v. Cotter Corp.*, 10 F.3d 746, 750 (10th Cir. 1993).

82. *Agster v. Maricopa County*, 422 F.3d 836, 838–39 (9th Cir. 2005); *Kelly v. Ford Motor Co.*, 110 F.3d 954, 964 (3d Cir. 1997); see also *In re England*, 375 F.3d 1169, 1176 (D.C. Cir. 2004); *United States v. Philip Morris Inc.*, 314 F.3d 612, 618–21 (D.C. Cir. 2003); *Pearson v. Miller*, 211 F.3d 57, 64 (3d Cir. 2000) (“An order denying the applicability of a claimed privilege conclusively determines the question, and does so in a way that is effectively unreviewable: once released, information has lost a measure of confidentiality that can never fully be regained.”).

83. See *Borntrager v. Cent. States, Se. & Sw. Areas Pension Fund*, 425 F.3d 1087, 1093 (8th Cir. 2005) (“Other circuits have applied the collateral order doctrine to permit immediate appeal of pre-trial discovery orders only in exceedingly narrow circumstances, such as when the discovery order would compel the production of allegedly privileged information.”).

84. See *Texaco, Inc. v. Louisiana Land & Exploration Co.*, 995 F.2d 43, 44 n.4 (5th Cir. 1993); see also Nicole E. Paolini, Comment, *The Cohen Collateral Order Doctrine: The Proper Vehicle for Interlocutory Appeal of Discovery Orders*, 64 TUL. L. REV. 215, 230–32 (1989).

85. *Church of Scientology of Cal. v. United States*, 506 U.S. 9, 18 n.11 (1992) (“[A] discovery order directed at a disinterested third party is treated as an immediately appealable final order because the third party presumably lacks a sufficient stake in the proceeding to risk contempt by refusing compliance.” (citing *Perlman v. United States*, 247 U.S. 7 (1918))).



confidential information under the *Cohen* doctrine.<sup>86</sup> In *Smith v. BIC Corp.*,<sup>87</sup> the Third Circuit relied on *Cohen* to conclude that a corporation could immediately appeal the required disclosure of information alleged to contain trade secrets.<sup>88</sup> The court held that the discovery order met each of the three *Cohen* requirements because: (1) the order “conclusively determine[d]” that BIC must disclose the information; (2) the issue was unrelated to the merits because the court could “evaluate whether or not a design is a trade secret without reaching the merits of whether or not it is a defective design”; and (3) the order would be effectively unreviewable on appeal “because once trade secrets are made public, they can obviously never be ‘secrets’ again.”<sup>89</sup>

In the immediate wake of *BIC*, few courts applied the collateral order doctrine to discovery orders. But after the Third Circuit reiterated its position in *Kelly v. Ford Motor Co.*,<sup>90</sup> concluding that an order requiring disclosure of information allegedly protected by the attorney-client and work-product privileges could be immediately appealed,<sup>91</sup> other courts began to rely on the collateral order doctrine to permit interlocutory appeals of privilege questions. The D.C. Circuit was the first to follow the *Ford Motor Co.* rule.<sup>92</sup> In *United States v. Philip Morris, Inc.*,<sup>93</sup> it noted that contempt was not a reliable way to secure interlocutory appellate review of a discovery order, as civil contempt judgments were not appealable and “a party that seeks review does not know in advance whether refusal to comply with the discovery order will result in a civil contempt order or a criminal contempt order.”<sup>94</sup> Because the court believed an interlocutory appeal was the only way that the party could obtain “effective review” of the discovery order, it allowed the appeal to go forward under the *Cohen* doctrine, concluding that each of the three prongs could be met in a privilege claim.<sup>95</sup>

---

86. *Smith v. BIC Corp.*, 869 F.2d 194, 199 (3d Cir. 1989).

87. 869 F.2d 194 (3d Cir. 1989).

88. *Id.* at 198–99.

89. *Id.*

90. 110 F.3d 954, 964 (3d Cir. 1997).

91. *Id.*; see also *Bacher v. Allstate Ins. Co.*, 211 F.3d 52, 53–55 (3d Cir. 2000); *Montgomery County v. Microvote Corp.*, 175 F.3d 296, 300 (3d Cir. 1999) (attorney-client and work product privileges).

92. See *United States v. Philip Morris Inc.*, 314 F.3d 612, 620–21 (D.C. Cir. 2003).

93. 314 F.3d 612 (D.C. Cir. 2003).

94. *Id.* at 620 (internal quotation marks omitted).

95. See *id.*

The Ninth Circuit followed similar logic in *Agster v. Maricopa County*,<sup>96</sup> where the district court ordered Maricopa County to release a mortality-review report, but the county claimed that the report was privileged under a medical peer-review privilege.<sup>97</sup> The court noted that it had not yet “resolved the general question of whether a discovery order disposing of an asserted claim of privilege could be independently appealed under the collateral order doctrine of *Cohen*.”<sup>98</sup> Nevertheless, the court concluded that the order would be appealable under the particular circumstances presented in *Agster*—specifically, when disclosure would affect trial strategy and therefore, “[e]ven if a new trial were ordered at which the material found to be privileged was not admissible, it might be impossible to undo the effects of the disclosure with regard to the information in plaintiffs’ hands and its effect on their trial strategy.”<sup>99</sup> Given how often information subject to a privilege claim could affect “trial strategy,” it seems likely that the Ninth Circuit would allow a *Cohen* appeal to be brought in a wide variety of privilege cases.

In short, *Cohen* appeals of disclosure orders are rarely allowed. Courts that do allow them—in particular, the Third, Ninth, and D.C. Circuits—rely most heavily on *Cohen*’s third prong, that effective review would be unavailable after a final judgment.<sup>100</sup> Other circuits, however, have refused to apply *Cohen* to discovery orders, with some noting that *Cohen*’s separability requirement precludes an interlocutory appeal of the privilege determination.<sup>101</sup>

---

96. 422 F.3d 836 (9th Cir. 2005).

97. *Id.* at 838.

98. *Id.* at 838–39 (internal quotation marks omitted).

99. *Id.* (internal quotation marks omitted).

100. *Kelly v. Ford Motor Co.*, 110 F.3d 954, 964 (3d Cir. 1997); *Agster*, 422 F.3d at 838–39; *United States v. Philip Morris Inc.*, 314 F.3d 612, 620 (D.C. Cir. 2003).

101. *See, e.g., MDK, Inc. v. Mike’s Train House, Inc.*, 27 F.3d 116, 121 (4th Cir. 1994) (“[T]his appeal cannot be considered apart from the course of the main litigation, a necessary prerequisite for application of the collateral order doctrine.”); *Peck v. United States (In re United States)*, 680 F.2d 9, 12 (2d Cir. 1982) (“[T]he discovery ruling in this case is ‘integral to, rather than “completely separate from,”’ the merits of the action. Peck seeks to discover relevant information from a party opponent in civil litigation.” (quoting *In re Attorney Gen.*, 596 F.2d 58, 61 (2d Cir. 1979))).

*D. Mandamus*

When no interlocutory appeal is available, a disclosure order may sometimes be reviewed through mandamus.<sup>102</sup> Appellate courts have the power to review district court orders through the exercise of the writ of mandamus, which “compel[s] a lower court . . . to perform mandatory or purely ministerial duties correctly.”<sup>103</sup> The power to issue a writ of mandamus comes from the All Writs Act,<sup>104</sup> which provides that “[t]he Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.”<sup>105</sup> In effect, mandamus review is “best understood as akin to an interlocutory appeal, a means to procure interlocutory review of a district court order.”<sup>106</sup> Mandamus review is available only as a last resort, when no other interlocutory review is available.<sup>107</sup>

A number of courts have used their mandamus power to review disclosure orders,<sup>108</sup> but, as with *Cohen* appeals, appellate courts are split

---

102. 16 FEDERAL PRACTICE, *supra* note 2, § 3935.3.

103. BLACK'S LAW DICTIONARY 973 (7th ed. 1999).

104. 28 U.S.C. § 1651 (2000).

105. *Id.*

106. Leah Epstein, Comment, *A Balanced Approach to Mandamus Review of Attorney Disqualification Orders*, 72 U. CHI. L. REV. 667, 678 (2005).

107. *Helstoski v. Meanor*, 442 U.S. 500, 505 (1979) (“The general principle which governs proceedings by *mandamus* is, that whatever can be done without the employment of that extraordinary writ, *may not be done with it*. It lies only when there is practically *no other remedy*.” (quoting *Ex parte Rowland*, 104 U.S. 604, 617 (1882))).

108. 16 FEDERAL PRACTICE, *supra* note 2, § 3935.3; *see also* *Peck v. United States (In re United States)*, 397 F.3d 274, 283 (5th Cir. 2005) (“[T]his court, in accord with other circuits, has considered and issued writs of mandamus over discovery orders implicating privilege claims.”); *United States ex rel. Chandler v. Cook County*, 277 F.3d 969, 981 (7th Cir. 2002), *aff'd*, 538 U.S. 119 (2003); *In re Spalding Sports Worldwide, Inc.*, 203 F.3d 800, 804 (Fed. Cir. 2000); *In re GMC*, 153 F.3d 714, 715 (8th Cir. 1998) (“Where the district court has . . . rejected a claim of attorney-client privilege, [we] will issue a writ of mandamus when the party seeking the writ has no other adequate means to attain the desired relief and the district court’s ruling is clearly erroneous.”); *Chase Manhattan Bank, N.A. v. Turner & Newall, PLC*, 964 F.2d 159, 163 (2d Cir. 1992); *In re Fink*, 876 F.2d 84, 85 (11th Cir. 1989); *Jenkins v. Weinshienk*, 670 F.2d 915, 917 (10th Cir. 1982) (“While mandamus is an extraordinary remedy and should be limited to exceptional cases, courts have recognized that when a district court orders production of information over a litigant’s claim of a privilege not to disclose, appeal after a final decision is an inadequate remedy; in these circumstances, an appellate court may exercise its mandamus power and consider the merits of the claimed privilege.”) (citation omitted); *United States v. U.S. Dist. Court*, 444 F.2d 651, 655–56 (6th Cir. 1971), *aff'd*, 407 U.S. 297 (1972); *Harper & Row Publishers, Inc. v. Decker*, 423 F.2d 487, 492 (7th Cir. 1970), *aff'd*, 400 U.S. 348 (1971) (“[B]ecause maintenance of the attorney-client privilege up to its proper limits has substantial importance to the administration of justice, and because an

over the propriety of mandamus review of discovery orders. Specifically, some circuits allowing *Cohen* review of certain privilege orders also allow review by mandamus in limited cases.<sup>109</sup> In addition, some courts that do not necessarily permit *Cohen* review will instead allow review by mandamus.<sup>110</sup> At least one circuit prefers to review such claims under *Cohen* rather than through mandamus.<sup>111</sup> Finally, two circuits do not generally allow either *Cohen* review or mandamus review of privilege orders.<sup>112</sup>

The controversy over mandamus review of discovery orders stems from the fact that the U.S. Supreme Court has admonished the appellate courts that mandamus is an “extraordinary remedy,” to be used in “only exceptional circumstances amounting to a judicial ‘usurpation of power,’ or a ‘clear abuse of discretion.’”<sup>113</sup> But the Court has not given clear guidance on just how exceptional those circumstances need to be before mandamus is justified. The Court has identified three conditions that must be met before a writ of mandamus can be issued.<sup>114</sup> First, “the party seeking issuance of the writ [must] have no other adequate means to attain the relief he desires.”<sup>115</sup> Second, the petitioner’s right to the writ must be “clear and indisputable.”<sup>116</sup> Finally, “even if the first two prerequisites have been met, the issuing court, in the exercise of its discretion, must be satisfied that the writ is appropriate under the circumstances.”<sup>117</sup> The first two conditions are relatively clear, but the third is less so. Consequently, the circuits disagree on when mandamus

---

appeal after disclosure of the privileged communication is an inadequate remedy, the extraordinary remedy of mandamus is appropriate.”); *Hartley Pen Co. v. U.S. Dist. Court, Cent. Div.*, 287 F.2d 324, 331 (9th Cir. 1961).

109. In the Ninth Circuit, see *Agster v. Maricopa County*, 422 F.3d 836, 838–39 (9th Cir. 2005) (*Cohen*) and *Hartley*, 287 F.2d at 331 (mandamus). In the Third Circuit, see *Kelly v. Ford Motor Co.*, 110 F.3d 954, 964 (3d Cir. 1997) (*Cohen*) and *Rhone-Poulenc Rorer v. Home Indemnity Co.*, 32 F.3d 851, 861 (3d Cir. 1994) (mandamus).

110. See *In re Lott*, 424 F.3d 446, 448 n.2 (6th Cir. 2005); *In re Bankamerica Corp. Sec. Litig.*, 270 F.3d 639, 641 (8th Cir. 2001).

111. See *United States v. Philip Morris Inc.*, 314 F.3d 612, 620 (D.C. Cir. 2003).

112. See, e.g., *United States v. Moussaoui*, 333 F.3d 509, 516–17 (4th Cir. 2003); *Bennett v. City of Boston*, 54 F.3d 18, 20–21 (1st Cir. 1995).

113. *Cheney v. U.S. Dist. Court*, 542 U.S. 367, 380 (2004) (quoting *Will v. United States*, 389 U.S. 90, 95 (1967) and *Bankers Life & Cas. Co. v. Holland*, 346 U.S. 379, 383 (1953)).

114. *Id.* at 380–81.

115. *Id.* at 380 (quoting *Kerr v. U.S. Dist. Court*, 426 U.S. 394, 403 (1976)).

116. *Id.* at 381.

117. *Id.* (quoting *Kerr*, 426 U.S. at 403).

is “appropriate under the circumstances”—and particularly whether it is appropriate to resolve a discovery dispute based on an alleged privilege.<sup>118</sup> The U.S. Supreme Court has made it clear that mandamus is an appropriate remedy in the most unusual and high-profile cases, such as a discovery dispute in which the Vice President is a party and substantial questions involving the separation of powers are at stake.<sup>119</sup> The Court left as an open question, however, whether mandamus would be appropriate to resolve a more ordinary discovery dispute.<sup>120</sup>

### 1. *Circuits are Split as to the “Extraordinariness” of Privilege Cases*

Unsurprisingly, circuits have differed in their analysis of whether privilege disputes are sufficiently “extraordinary” to warrant mandamus relief.<sup>121</sup> Some courts have held that when the first two elements have been met—that is, when a party can show that the district court has made a “clear and indisputable” error in its privilege determination and can show that no other relief is available to correct the harm caused by the erroneous order, mandamus is appropriate.<sup>122</sup> The Third Circuit, for example, has held that once the first two requirements have been satisfied, the third is also satisfied,<sup>123</sup> concluding that “[m]andamus may properly be used as a means of immediate appellate review of orders compelling the disclosure of documents and information claimed to be protected from disclosure by privilege or other interests in confidentiality.”<sup>124</sup> The Third Circuit’s test focuses on the potential harm to the petitioners if review is denied, and allows mandamus review when the petitioners would face “grave injustice” if interlocutory review were denied.<sup>125</sup> Similarly, the Sixth Circuit has concluded that “forced

---

118. Compare *In re Avantel, S.A.*, 343 F.3d 311, 317 (5th Cir. 2003) (“[I]t is established that mandamus is an appropriate means of relief if a district court errs in ordering the discovery of privileged documents, as such an order would not be reviewable on appeal.”) with *In re Underwriters at Lloyd’s*, 666 F.2d 55, 58 (4th Cir. 1981) (“The rule is firmly and universally established that mandamus cannot be used to challenge ordinary discovery orders.”).

119. See *Cheney*, 542 U.S. at 381–82.

120. *Id.* at 381.

121. 16 FEDERAL PRACTICE, *supra* note 2, § 3935.3, at 606–08 n.6.

122. See, e.g., *Rhone-Poulenc Rorer v. Home Indem. Co.*, 32 F.3d 851, 861 (3d Cir. 1994).

123. See *id.*

124. *Id.*

125. See *Bogosian v. Gulf Oil Corp.*, 738 F.2d 587, 591 (3d Cir. 1984) (“We caution that mandamus is not to be used as an ordinary vehicle to obtain interlocutory relief from discovery orders. It is, however, available when necessary to prevent grave injustice.”).

disclosure of privileged material may bring about irreparable harm,” and has held that mandamus is the only method by which a party ordered to disclose privileged material may obtain relief.<sup>126</sup> The Fifth, Eighth, Ninth and Eleventh Circuits have also adopted this view.<sup>127</sup> The Ninth Circuit has even written that mandamus can be available in “an ordinary case”—not just an unusual one or a “cause celebre”—when “ordinary remedies are inadequate” and circumstances “require the issuance of an extraordinary writ to prevent a grave miscarriage of justice.”<sup>128</sup>

Conversely, the Second Circuit has expressed more reluctance to allow review by mandamus.<sup>129</sup> It has suggested that irreparable harm to the litigants is not enough by itself, and has instead held that courts should consider the importance of the legal question raised as well as the possibility of irreparable injury.<sup>130</sup> The court developed a three-part test for discovery orders involving privilege claims, concluding that mandamus review is appropriate when: “(i) an issue of importance and of first impression is raised; (ii) the privilege will be lost in the particular case if review must await a final judgment; and (iii) immediate resolution will avoid the development of discovery practices or doctrine undermining the privilege.”<sup>131</sup>

The Second Circuit’s test is narrower than the standard applied by the Third, Fifth, Sixth, Eighth, Ninth, and Eleventh Circuits; thus, the Second Circuit will sometimes deny relief when those circuits would

---

126. *In re Perrigo Co.*, 128 F.3d 430, 437 (6th Cir. 1997); *see also* *Chesher v. Allen*, 122 F. App’x 184, 187 (6th Cir. 2005) (“It is also important to note that this court has a more flexible approach to mandamus than other circuits. . . . [W]e have said that mandamus is particularly appropriate to review discovery decisions that would not be appealable until final judgment, especially decisions related to privileges.”). *But see* *United States ex rel. Pogue v. Diabetes Treatment Ctrs. of Am., Inc.*, 444 F.3d 462, 474 (6th Cir. 2006).

127. *See In re Avantel, S.A.*, 343 F.3d 311, 317 (5th Cir. 2003) (“[I]t is established that mandamus is an appropriate means of relief if a district court errs in ordering the discovery of privileged documents, as such an order would not be reviewable on appeal.”); *In re Bankamerica Corp. Sec. Litig.*, 270 F.3d 639, 641 (8th Cir. 2001) (“Though mandamus is an extraordinary remedy, we will issue the writ when the district court has committed a clear error of law or abuse of discretion in ordering the disclosure of privileged materials.”); *Hartley Pen Co. v. U.S. Dist. Court*, 287 F.2d 324, 328 (9th Cir. 1961); *In re Fink*, 876 F.2d 84, 84 (11th Cir. 1989) (“In the context of discovery orders which will compromise a claim of privilege or invasion of privacy rights, mandamus has been found appropriate . . . . [I]f there has been a clear abuse of discretion in allowing discovery, mandamus is an appropriate remedy.”) (citation omitted).

128. *Hartley Pen*, 287 F.2d at 328.

129. *See Chase Manhattan Bank, N.A. v. Turner & Newall, PLC*, 964 F.2d 159, 163 (2d Cir. 1992).

130. *See id.*

131. *Id.*

not.<sup>132</sup> For example, the Second Circuit declined to review a case in which an insurance company sought discovery of documents prepared by its insured's outside counsel.<sup>133</sup> The district court had concluded that, even though the insurance company was denying coverage, it had enough of a "common interest" with its insured to defeat the attorney-client privilege.<sup>134</sup> The Second Circuit acknowledged that "the contours of the 'common interest' doctrine are significant and deserve careful consideration in the varied circumstances that may arise in relationships between an insured and its insurer."<sup>135</sup> Nonetheless, the court concluded that it did not believe either that the "determination of the doctrine's applicability . . . presents such a novel and important issue as to warrant mandamus review," or that "even an erroneous application of the doctrine, if such should occur, poses a significant risk of undermining the privilege."<sup>136</sup> The court therefore denied mandamus without regard to the merits of the underlying discovery order.<sup>137</sup> The Tenth Circuit has followed the Second Circuit's more rigorous standard, and the Federal Circuit has also cited it approvingly.<sup>138</sup> Finally, the Sixth Circuit has also recently focused on the "extraordinary situations" prong of mandamus review in this area, denying mandamus when a privilege claim was not sufficiently extraordinary.<sup>139</sup>

The First and Fourth Circuits have rejected the other circuits' more lenient standard and seem to be even stricter than the Second Circuit.<sup>140</sup>

---

132. See *In re Dow Corning Corp.*, 261 F.3d 280, 285 (2d Cir. 2001) ("Mandamus is a remedy rarely granted by this Court. 'Unlike other circuits, we have rarely used the extraordinary writ of mandamus to overturn a discovery order involving a claim of privilege.'" (quoting *Chase Manhattan*, 964 F.2d at 163); *In re W.R. Grace & Co.-Conn.*, 984 F.2d 587, 589 (2d Cir. 1993).

133. *In re W.R. Grace*, 984 F.2d at 589.

134. *Id.* at 588.

135. *Id.* at 589.

136. *Id.*

137. *Id.*

138. See *In re The Regents of the Univ. of Cal.*, 101 F.3d 1386, 1388 (Fed. Cir. 1996) (noting that a case involving attorney-client privilege met the "rigorous requirements" laid out by the Second Circuit); *Boughton v. Cotter Corp.*, 10 F.3d 746, 751 (10th Cir. 1993) ("With discovery orders involving a claim of privilege we require both that the disclosure render impossible any meaningful appellate review of the claim and that the disclosure involves questions of substantial importance to the administration of justice."); *Barclaysamerican Corp. v. Kane*, 746 F.2d 653, 655 (10th Cir. 1984) (requiring "a question of substantial importance to the administration of justice" beyond the privilege question itself).

139. *United States ex rel. Pogue v. Diabetes Treatment Ctrs. of Am., Inc.*, 444 F.3d 462, 472-74 (6th Cir. 2006).

140. See *In re State & County Mut. Fire Ins. Co.*, 138 F. App'x 539, 540 (4th Cir. 2005); *Bennett v. City of Boston*, 54 F.3d 18, 21 (1st Cir. 1995); *In re Underwriters at Lloyd's*, 666 F.2d 55, 58

They have refused to exercise their mandamus authority in privilege cases no less compelling than cases in which the other circuits have granted relief.<sup>141</sup> This reluctance even extended to a case in which the Fourth Circuit acknowledged that there was an important question of first impression relating to governmental privilege in a case involving issues of national security.<sup>142</sup>

## 2. *Courts Disagree Over the Degree of Error Necessary for Mandamus Relief*

Although many of the circuits use the writ of mandamus to review privilege claims, these claims do not easily fit into the doctrinal standards that the U.S. Supreme Court has developed for mandamus actions. The Court has said repeatedly that mandamus is appropriate only in cases involving judicial “usurpation of power” or “a clear abuse of discretion.”<sup>143</sup> The Court has also suggested that mandamus may be available “to settle important issues of first impression”;<sup>144</sup> this type of review is generally referred to as “advisory mandamus.”<sup>145</sup> There is

---

(4th Cir. 1981).

141. See *Bennett*, 54 F.3d at 21 (assuming without deciding that some discovery orders could be “sufficiently exceptional to warrant mandamus relief,” but nonetheless concluding that the district attorney’s claim of qualified privilege against compelled government disclosure of sensitive investigative techniques did not meet the mandamus standard in that case); *In re Underwriters*, 666 F.2d at 58 (“The rule is firmly and universally established that mandamus cannot be used to challenge ordinary discovery orders.”); *In re State & County*, 138 F. App’x at 540 (acknowledging that mandamus is a “drastic and extraordinary” remedy).

142. *United States v. Moussaoui*, 333 F.3d 509, 516 (4th Cir. 2003). In *Moussaoui*, the Fourth Circuit faced the question of whether the government had to produce a potentially exculpatory witness for deposition in a criminal trial based on terrorism charges, even though the government asserted that producing the witness for deposition would have “devastating consequences for national security and foreign relations.” *Id.* at 512. The district court had ordered that the witness be produced for a deposition, concluding that “Moussaoui and the public’s interest in a fair trial outweighed the Government’s national security interest in precluding access to the enemy combatant witness.” *Id.* at 513. The Fourth Circuit concluded that mandamus review of that decision was inappropriate, not because the issue was unimportant, but instead because it was difficult, and therefore the government could not show that its right to the writ was “clear and undisputable.” *Id.* at 517 (The “substantive issues involved . . . are complex and difficult, and the answer is not easily discerned.”).

143. See *Cheney v. U.S. Dist. Court*, 542 U.S. 367, 380 (2004).

144. *Id.* at 391; see also *Schlagenhauf v. Holder*, 379 U.S. 104, 111 (1964) (noting that there was an allegation of usurpation as to one question and holding that the Court’s mandamus review would extend to a second issue “to avoid piecemeal litigation and to settle new and important problems”).

145. Michael W. McConnell, Comment, *The Appealability of Orders Denying Motions for Disqualification of Counsel in the Federal Courts*, 45 U. CHI. L. REV. 450, 475 (1978).



disagreement, however, about whether the existence of an important issue of first impression can substitute for the Court's requirement that there be either a clear abuse of discretion or a usurpation of power.<sup>146</sup> This distinction is especially important in privilege cases, which often raise novel issues or questions of first impression.<sup>147</sup>

The advantage of the "clear abuse of discretion" test<sup>148</sup> is that it "does not require appellate courts to probe extensively into the merits of a case."<sup>149</sup> If competing considerations must be weighed, or difficult questions prevent the district court's privilege determination from being clearly erroneous, then the appellate court will deny mandamus relief.<sup>150</sup> When courts apply the "clear abuse of discretion" test to issues of first impression on mandamus review, they generally measure that abuse of discretion with the benefit of hindsight.<sup>151</sup> In such cases, the appellate

---

146. Compare *Republic of Venez. v. Philip Morris Inc.*, 287 F.3d 192, 198 (D.C. Cir. 2002) ("[N]o writ of mandamus—whether denominated 'advisory,' 'supervisory,' or otherwise—will issue unless the petitioner shows . . . that the writ is necessary to amend a clear error or abuse of discretion.") with *In re Cement Antitrust Litig.*, 688 F.2d 1297, 1307 (9th Cir. 1982) ("[W]e have some doubt that the district court's order need be 'clearly' erroneous in supervisory mandamus cases where the petition raises an important question of law of first impression, the answer to which would have a substantial impact on the administration of the district courts."); see also Note, *Supervisory and Advisory Mandamus Under the All Writs Act*, 86 HARV. L. REV. 595, 615 & n.86 (1973) [hereinafter *Mandamus and the All Writs Act*] ("*Schlagenhauf* . . . left no room in the area of advisory mandamus for a requirement of degree of error.").

147. Maryellen Fullerton, *Exploring the Far Reaches of Mandamus*, 49 BROOK. L. REV. 1131, 1152 (1983) ("Those rare cases where discovery rulings require mandamus relief, however, generally present novel questions concerning federal rules of procedure and therefore call forth the advisory mandamus power of the appellate court."). Most privilege disputes will require determination of discoverability under Rule 26(b)(1) of the Federal Rules of Civil Procedure, which provides that parties may only obtain discovery of matters "not privileged."

148. Although some circuit courts use the term "clear error" as a synonym for "abuse of discretion," the U.S. Supreme Court has suggested that the latter term is preferable to describe the deferential standard of review applied to a trial court's entry of a discretionary order. *Ornelas v. United States*, 517 U.S. 690, 694 n.3 (1996) ("While the Seventh Circuit uses the term 'clear error' to denote the deferential standard applied when reviewing determinations of reasonable suspicion or probable cause, we think the preferable term is 'abuse of discretion.' 'Clear error' is a term of art derived from Rule 52(a) of the Federal Rules of Civil Procedure, and applies when reviewing questions of fact."). See also *In re Rhone-Poulenc Rorer Inc.*, 51 F.3d 1293, 1295 (7th Cir. 1995) (holding that, in order to be subject to mandamus review, "the order must so far exceed the proper bounds of judicial discretion as to be legitimately considered usurpative in character, or in violation of a clear and indisputable legal right, or, at the very least, patently erroneous").

149. Christina Melady Morin, Note, *Review and Appeal of Forum Non Conveniens and Venue Transfer Orders*, 59 GEO. WASH. L. REV. 715, 721 (1991).

150. See, e.g., *United States v. Moussaoui*, 333 F.3d 509, 516 (4th Cir. 2003).

151. See *Calderon v. U.S. Dist. Court*, 163 F.3d 530, 536 n.5 (9th Cir. 1998) ("In order to decide whether 'clear error as a matter of law' exists, we must first examine what the law is, before deciding whether the district court clearly departed from it."); *Mandamus and the All Writs Act*,

court will both establish the parameters of a new legal doctrine and apply it to the case at hand. For example, in *In re Lott*,<sup>152</sup> the Sixth Circuit addressed the question of whether a habeas petitioner claiming actual innocence should be required to waive attorney-client privilege.<sup>153</sup> Once the court decided that attorney-client privilege need not be waived, it concluded that the district court had abused its discretion in ordering privileged materials to be disclosed and granted the writ to order the district court to vacate its order compelling discovery.<sup>154</sup>

Some courts, however, do not use the “clear abuse of discretion” test at all when a mandamus petition presents an issue of first impression, but instead apply only an “ordinary error” standard.<sup>155</sup> This lower standard will not likely affect the appellate court’s review of the trial court’s factual findings, as appellate courts review such findings only for clear error even in an ordinary appeal.<sup>156</sup> Similarly, it will not affect the legal standard articulated by the appellate court, as legal determinations are made *de novo*.<sup>157</sup> Applying a lower “ordinary error” standard on mandamus review will, however, affect the appellate court’s analysis of whether the trial court properly applied the law to the facts, as the standard of review to be applied to such a determination varies according to the type of proceeding.<sup>158</sup>

The degree of deference given to the trial court’s application of the law to the facts may have a dispositive effect in some cases. For example, even though communications can lose their privileged status through disclosure, some courts have established a legal rule that the privilege will remain intact if the disclosure was merely inadvertent or

---

*supra* note 146, at 600 (noting that clear error could exist even when “the merits of the controversy had been very much in issue up until the time the Court decided to issue the writ”).

152. 424 F.3d 446 (6th Cir. 2005).

153. *Id.* at 452–56.

154. *Id.* at 456.

155. *In re Cement Antitrust Litig.*, 688 F.2d 1297, 1307 (9th Cir. 1982) (“[W]e have some doubt that the district court’s order need be ‘clearly’ erroneous in supervisory mandamus cases where the petition raises an important question of law of first impression . . .”), *aff’d by absence of quorum sub nom.* Arizona v. U.S. Dist. Court, 459 U.S. 1191 (1983).

156. *Venegas-Hernandez v. Asociacion de Compositores y Editores de Musica Latinoamericana*, 424 F.3d 50, 53 (1st Cir. 2005) (“The standard of review is *de novo* for issues of law, clear error for factual findings, and varying degrees of deference on law application, procedural matters, and choice of penalties.”).

157. *Id.*

158. *Id.*

unintentional.<sup>159</sup> In ruling on a mandamus petition, the appellate court can formulate a rule of law that the inadvertent disclosure will not waive privilege. The court's application of that rule, however, will depend on the degree of deference given to the district court's decision: will the appellate court consider *de novo* whether the particular disclosure was sufficiently inadvertent to maintain its privileged character? Or will it defer to the district court's determination of that issue, reversing only if the district court clearly erred in finding the disclosure insufficiently inadvertent, and thus clearly abused its discretion in ordering discovery? The appellate court's answer to this question may determine whether it orders the district court to vacate the discovery order.<sup>160</sup> As a result, the different standards applied by the circuits lead to different results.

### E. Summary

The circuits' varying approaches to the appealability of privilege determinations reflect a deep circuit split in need of resolution. Some litigants will only be able to secure interlocutory review if they first stand in contempt of court, refusing to comply with the district court's disclosure order. But, in the circuits that broadly apply the *Cohen* collateral order doctrine to privilege determinations, litigants will generally have an absolute right to an interlocutory appeal of certain privilege determinations. Finally, in circuits that allow mandamus review of such determinations, litigants will not be assured of an absolute right to appeal—but may still be able to secure relief through interlocutory review, depending in some circuits on the importance of the issues raised, and in others on whether the district court clearly abused its discretion in making the discovery order.

---

159. See *Gray v. Bicknell*, 86 F.3d 1472, 1483 (8th Cir. 1996); Ken M. Zeidner, Note, *Inadvertent Disclosure and the Attorney-Client Privilege: Looking to the Work Product Doctrine for Guidance*, 22 CARDOZO L. REV. 1315, 1318–19 (2001) (outlining three divergent approaches to inadvertent disclosures in the federal courts).

160. See *In re Bieter Co.*, 16 F.3d 929, 940 (8th Cir. 1994) The court applied the more stringent "clear abuse of discretion" test, and explained the difference between the two standards of review:

Had the district court applied the correct legal standard but, in the course of applying the *Diversified* test, determined that the communications had not satisfied one or more of the five requirements, we believe that it would have committed reversible error, but that such error would probably not constitute a clear abuse of discretion.

### III. PROBLEMS CAUSED BY THE CIRCUIT SPLIT

The circuits' varying approaches need to be reconciled. The current split ensures that some litigants have access to interlocutory review and relief that others do not, based only on geographic location. The split may also lead to undesirable consequences if parties know before filing suit that privilege questions are likely to play a role in the litigation and therefore attempt to forum shop based on the potential appellate remedies in certain circuits.<sup>161</sup>

The split also leads to unpredictability, both in terms of procedure and in terms of the substantive law of privilege. Procedurally, a circuit split "permit[s] unnecessary uncertainty over which interpretation of a federal law will be applied by a circuit that has not yet ruled on a question."<sup>162</sup> In the Eighth Circuit, for example, a party could either pursue mandamus review, which is available in that circuit if the district court has committed a clear abuse of discretion,<sup>163</sup> or it could attempt to appeal under the *Cohen* doctrine, which is a more uncertain remedy in the Eighth Circuit but would require a showing only of ordinary error to obtain relief.<sup>164</sup> In order to play it safe, a party may well choose both to file a mandamus petition and to attempt an interlocutory appeal, thus engaging in potentially unnecessary and duplicative efforts simply because the circuits have split over the proper remedy for erroneous privilege determinations.

Finally, the uncertainty in review procedures creates uncertainty in the privileges themselves. Litigants who are afraid they will be bound by an erroneous disclosure order may be reluctant to engage in frank attorney-client discussion or other privileged communication. This

---

161. J. Clifford Wallace, *The Nature and Extent of Intercircuit Conflicts: A Solution Needed for a Mountain or a Molehill?*, 71 CAL. L. REV. 913, 930 (1983) (asserting that intercircuit conflicts could "encourage tactical ploys designed to avoid the unfavorable approach of one circuit or take advantage of the favorable approach of another circuit"); Aaron M. Streett, *Can Privilege Rulings Be Immediately Appealed? Circuits Are Split Over Whether Collateral-Order Doctrine Should Apply*, NAT'L L.J., Feb. 27, 2006, at S6 ("It is unfortunate that something as central to our legal system as attorney-client confidentiality is protected differently depending on the federal circuit in which one resides.").

162. Wallace, *supra* note 161, at 930.

163. See *In re Bankamerica Corp. Sec. Litig.*, 270 F.3d 639, 641 (8th Cir. 2001) ("Though mandamus is an extraordinary remedy, we will issue the writ when the district court has committed a clear error of law or abuse of discretion in ordering the disclosure of privileged materials.").

164. See *Borntrager v. Cent. States, Se. & Sw. Areas Pension Fund*, 425 F.3d 1087, 1093 (8th Cir. 2005) (leaving open the question of whether the Eighth Circuit might be willing to apply the *Cohen* doctrine in an appropriate privilege case).

uncertainty is especially harmful, as parties “must be able to predict with some degree of certainty whether particular discussions will be protected. An uncertain privilege, or one which purports to be certain but results in widely varying applications by the courts, is little better than no privilege at all.”<sup>165</sup>

While the circuit split needs to be resolved, none of the circuits’ current approaches fully realizes the goals of appellate review. Litigation sanctions are an unreliable method of review, as a litigant cannot predict whether the court will issue an appealable criminal contempt order or a nonappealable civil contempt order.<sup>166</sup> District courts rarely grant permission to pursue a discretionary appeal under § 1292(b), even in cases where the circuit cases later determine that relief is necessary.<sup>167</sup> The requirements of the *Cohen* doctrine limit its applicability in civil cases.<sup>168</sup> Finally, mandamus review is not generally available in cases presenting a close legal question.<sup>169</sup>

#### A. *Litigation Sanctions Are an Unreliable Method for Obtaining Review*

Courts that require litigants to risk litigation sanctions in order to obtain review generally point out that the possibility of such sanctions “serves efficiency interests” by “encourag[ing] reflection both by the party seeking discovery and by the party resisting it.”<sup>170</sup> The U.S. Supreme Court has therefore required that a party objecting to a discovery request refuse to comply with a disclosure order in order to preserve a right to litigate those questions.<sup>171</sup> The Court reasoned that “unless a party resisting discovery is willing to risk being held in contempt, the significance of his claim is insufficient to justify interrupting the ongoing proceedings.”<sup>172</sup>

---

165. *Jaffee v. Redmond*, 518 U.S. 1, 18 (1996) (quoting *Upjohn Co. v. United States*, 449 U.S. 383, 393 (1981)).

166. *See infra* Part III.A.

167. *See infra* Part III.B.

168. *See infra* Part III.C.

169. *See infra* Part III.D.

170. *Gill v. Gulfstream Park Racing Ass’n*, 399 F.3d 391, 397 (1st Cir. 2005) (quoting *FDIC v. Ogden Corp.*, 202 F.3d 454, 459 (1st Cir. 2000)).

171. *United States v. Ryan*, 402 U.S. 530, 532 (1971).

172. *Pennsylvania v. Ritchie*, 480 U.S. 39, 50 (1987) (identifying the “implicit assumption” relied upon in *Ryan*).

While risking a contempt judgment may encourage reflection and demonstrate sincerity, this method of testing a privilege claim has proved to be somewhat haphazard in practice. Rarely is the denial of discovery dispositive of the entire case. More often, there will be no dismissal that can be immediately appealed, and the appellate relief, if any, must wait until after trial.<sup>173</sup> Neither are criminal contempt sanctions or default judgments particularly reliable methods of obtaining review of disclosure orders; a party resisting discovery cannot be assured that the district court will sanction it using either of these mechanisms. Indeed, the district court will usually attempt to compel compliance through civil contempt before sanctioning the party through criminal contempt—and unlike criminal contempt judgments, civil contempt is not generally reviewable until after final judgment.<sup>174</sup> Furthermore, some non-appealable civil contempt sanctions may be quite severe. For example, one district court imposed a sanction of \$150,000 per day when IBM refused to turn over material that it believed was protected by the attorney-client privilege.<sup>175</sup> Because the sanction was civil rather than criminal, IBM could not immediately appeal it.<sup>176</sup> At least one court has noted that the potential severity of sanctions is a strong deterrent to attempting to vindicate a privilege claim by resisting a discovery order;<sup>177</sup> the D.C. Circuit has written that sanctions “may be of such severity that a reasonable party would not risk incurring them, even in order to preserve a clearly meritorious privilege claim.”<sup>178</sup>

### *B. Unavailability of Review Through Discretionary Appeals*

At first glance, the discretionary appeal process of § 1292(b) appears to provide a more reliable review mechanism than the litigation

---

173. See *Clift v. United States*, 597 F.2d 826, 828 (2d Cir. 1979) (recognizing that orders refusing to compel the production of documents “are usually routine, non-appealable interlocutory orders,” but holding that when the denial of motion for discovery was the basis for dismissal it was therefore reviewable on appeal).

174. 8 FEDERAL PRACTICE, *supra* note 2, § 2006 (“If a party is found guilty of criminal contempt for failure to comply with a discovery order, that is a separate proceeding and the contempt judgment is immediately appealable. If the party is held to be in civil contempt, review must await final judgment . . .”); see also *United States v. Philip Morris Inc.*, 314 F.3d 612, 620 (D.C. Cir. 2003).

175. *Int’l Bus. Machs. Corp. v. United States*, 493 F.2d 112, 114 (2d Cir. 1973).

176. *Id.* at 120 (Timbers, J., dissenting).

177. *Philip Morris*, 314 F.3d at 620.

178. *Id.*

sanctions described above. The discretionary appeal process does not require a litigant to risk imprisonment or large financial penalties in order to vindicate a privilege claim. But, because district court judges have been unwilling to certify cases for discretionary review, such review has not proven to be a workable remedy in practice.<sup>179</sup> On occasion, this provision has indeed been used to permit immediate appellate review of a privilege claim.<sup>180</sup> But these occasions are rare; unfortunately, § 1292(b) appears to be significantly underutilized,<sup>181</sup> and, as long as the agreement of both district and circuit courts is required, it is likely to remain underutilized. District judges rarely grant certification under this provision.<sup>182</sup> In fact, one scholar has stated that “by providing trial courts with a veto over appeals, the certificate requirement has vastly reduced section 1292(b)’s potential effectiveness as a safety valve from the rigors of the final judgment rule.”<sup>183</sup> From the district court’s perspective, there is little incentive to certify orders for appeal; an interlocutory appeal increases the opportunities for reversal and “invites delay and circuit interference.”<sup>184</sup>

As a result, district courts rarely certify discovery orders—even in cases that are later deemed by higher courts to merit interlocutory review. For example, in *Agster*, the parties disputed whether a medical peer review privilege protected a report generated by a company that provided health services at the county jail.<sup>185</sup> Although the district court refused to certify an interlocutory appeal to resolve the question, the Ninth Circuit nevertheless held that interlocutory review was necessary “because significant strategic decisions turn on [the order’s] validity,” and because “review after final judgment may therefore come too

---

179. See Timothy P. Glynn, *Discontent and Indiscretion: Discretionary Review of Interlocutory Orders*, 77 NOTRE DAME L. REV. 175, 195 (2001); Martin H. Redish, *The Pragmatic Approach to Appealability in the Federal Courts*, 75 COLUM. L. REV. 89, 92 (1975) (suggesting the need to relax the rule of finality by use of a pragmatic approach to the appealability of interlocutory orders).

180. See *Miller v. Transamerica Press, Inc.*, 621 F.2d 721, 722 (5th Cir. 1980), *opinion supplemented* at 628 F.2d 932, *cert. denied*, 450 U.S. 1041 (1981) (“In this 28 U.S.C. § 1292(b) interlocutory appeal, we decided whether the plaintiff in a libel suit can compel discovery of the identity of a confidential source of the journalist defendants. We conclude that he can.”); *Transamerica Computer Co. v. Int’l Bus. Machs. Corp.*, 573 F.2d 646, 647 (9th Cir. 1978).

181. Glynn, *supra* note 179, at 195 (recognizing that some circuits have held that review under § 1292(b) should be granted only in “big or exceptional cases”).

182. *Id.*

183. Redish, *supra* note 179, at 108–09.

184. Glynn, *supra* note 179, at 263 n.308.

185. *Agster v. Maricopa County*, 422 F.3d 836, 838 (9th Cir. 2005).

late.”<sup>186</sup> Interestingly, the Ninth Circuit affirmed the district court’s denial of the peer review privilege; it did not disagree with the district court’s decision on the merits, but only on the question of interlocutory appealability.<sup>187</sup> Another district court even denied § 1292(b) certification on an issue subsequently deemed worthy of review by the U.S. Supreme Court in *Cheney v. United States District Court*.<sup>188</sup> The case involved substantial questions regarding the separation of powers between the executive and judicial branches of the United States government when a sitting vice president is a party to the case.<sup>189</sup> When district courts refuse to allow discretionary review even in cases where the appellate courts later determine that interlocutory relief is warranted, it is clear that the current discretionary review practices do not provide the necessary levels of certainty and predictability to offer effective appellate relief.

C. *Civil Cases Are Often Unable to Meet the Requirements of the Cohen Collateral Order Doctrine*

Given the unreliability of sanctions orders and the unavailability of discretionary review, it is not surprising that courts have turned to other mechanisms to provide interlocutory review of discovery orders. In *Agster*, for example, when the district court refused to certify a discretionary appeal, the Ninth Circuit employed the *Cohen* collateral order doctrine to review the disclosure order.<sup>190</sup> Nevertheless, as noted above, the circuits disagree about the propriety of applying the *Cohen* doctrine to review privilege determinations.<sup>191</sup> Based on current U.S. Supreme Court jurisprudence, it appears that the *Cohen* collateral order doctrine cannot provide a consistent mechanism to review disclosure rulings in civil cases. In criminal cases, however, the doctrine may be much more effective.

---

186. *Id.* (quoting *Bittaker v. Woodford*, 331 F.3d 715, 717–18 (9th Cir. 2003)).

187. *Id.* at 839.

188. 542 U.S. 367, 401 (2004).

189. *Id.* at 380–81.

190. *Agster*, 422 F.3d at 838.

191. *See supra* Part II.C.



*1. Privilege Issues in Civil Cases Are Inseparable from the Merits*

*Cohen's* applicability is limited in civil cases because courts cannot do a case-by-case analysis of the *Cohen* prongs; instead, the U.S. Supreme Court requires that the *Cohen* factors be analyzed in relation to a "category" of orders.<sup>192</sup> Thus, the operative inquiry is not whether the privilege question is important, separable from the merits, and incapable of review after final judgment in a particular case—rather, the question is whether these requirements can be met for an entire category of cases.<sup>193</sup> Courts that have applied *Cohen* to privilege determinations in civil cases have generally ignored this directive, analyzing whether *Cohen's* requirements are satisfied in a particular case, not whether they would generally be satisfied in the relevant category of cases.<sup>194</sup>

When the *Cohen* requirements are applied to privilege claims as a category, discovery orders are likely to fail the separability prong of the *Cohen* test. Although the U.S. Supreme Court has not yet ruled on the separability of privilege claims, its probable position can be inferred from its ruling on the separability of orders disqualifying counsel.<sup>195</sup> The Court has concluded that an order disqualifying counsel in a civil case could not meet the separability requirement because, even if the disqualification question could be separated from the merits of the claim in that particular case, many disqualification orders could not be.<sup>196</sup> In particular, two types of disqualification orders are inextricably intertwined with the merits. First, orders disqualifying attorneys who might testify at trial "are inextricable from the merits because they

---

192. *Digital Equip. Corp. v. Desktop Direct*, 511 U.S. 863, 868 (1994) ("[T]he issue of appealability under § 1291 is to be determined for the entire category to which a claim belongs, without regard to the chance that the litigation at hand might be speeded, or a 'particular unjustic[e]' averted, by a prompt appellate court decision." (alteration in original) (quoting *Van Cauwenberghe v. Biard*, 486 U.S. 517, 529 (1988))); see also *In re Lott*, 424 F.3d 446, 449 (6th Cir. 2005) (concluding that mandamus review was more appropriate than collateral order review because "[t]here is some question as to whether each and every privilege ruling by a district court necessitates appellate review").

193. See *Desktop Direct*, 511 U.S. at 868.

194. See *United States v. Philip Morris Inc.*, 314 F.3d 612, 617 (D.C. Cir. 2003) ("Clearly, the privilege question is separable from the merits of the underlying case."); *Kelly v. Ford Motor Co.*, 110 F.3d 954, 958 (3d Cir. 1997) ("Kelly submits that a determination of the issues of privilege and work product will in fact implicate the merits of the underlying dispute. We believe that it will not."); *Agster*, 422 F.3d at 838 ("[U]nder the specific circumstances of this case, including the nature and importance of the privilege at issue, jurisdiction lies.").

195. See *Richardson-Merrell, Inc. v. Koller*, 472 U.S. 424, 439 (1985).

196. *Id.*

involve an assessment of the likely course of the trial and the effect of the attorney's testimony on the judgment."<sup>197</sup> Second, disqualification orders based on attorney misconduct "may be entwined with the merits of the litigation as well," because "[i]f reversal hinges on whether the alleged misconduct is 'likely to infect future proceedings,' courts of appeals will often have to review the nature and content of those proceedings to determine whether the standard is met."<sup>198</sup>

In a civil suit, many discovery orders based on privilege are also likely to be similarly intertwined with the merits of the claim, and less-than-absolute privileges especially so. For example, a court considering whether the governmental deliberative-process privilege applies to requested information must consider "the relevance of the privileged evidence, the availability of other evidence, the seriousness of the litigation, the role of the government in the litigation, and the potentially chilling effect that disclosure would have upon other government employees."<sup>199</sup> Likewise, trade secrets and material subject to the work-product doctrine may often be protected from discovery, but not absolutely.<sup>200</sup> In determining whether a purported trade secret is subject to discovery, a court must weigh the "claim to privacy against the need for disclosure."<sup>201</sup> Similarly, in determining whether the work-product doctrine prohibits discovery, a court must determine whether the party seeking the discovery "is unable without undue hardship to obtain the substantial equivalent of the materials by other means."<sup>202</sup> Any inquiry into the relevance of the discovery to the party's claims, or to the hardship incurred if the party is denied discovery, requires "an assessment of the likely course of the trial" and analysis of the "nature and content" of the party's claims.<sup>203</sup> Consequently, under the U.S. Supreme Court's jurisprudence, these confidentiality claims are inextricably intertwined with the merits.<sup>204</sup>

---

197. *Id.* (citation omitted).

198. *Id.* (quoting *Koller v. Richardson-Merrell Inc.*, 737 F.2d 1038, 1053 (D.C. Cir. 1984), *vacated*, 472 U.S. 424, 439 (1985)).

199. *Melzer v. Bd. of Educ.*, 176 F.R.D. 71, 73 (E.D.N.Y. 1997).

200. *Fed. Open Mkt. Comm. of the Fed. Reserve Sys. v. Merrill*, 443 U.S. 340, 362 (1979); *FED. R. CIV. P. 26(b)(3)*.

201. *Merrill*, 443 U.S. at 362 (quoting advisory committee note to *FED. RULE CIV. P. 26*).

202. *FED. R. CIV. P. 26(b)(3)*.

203. *See Koller*, 472 U.S. at 439.

204. *Id.*

Even unqualified privileges, such as the attorney-client privilege, will often be intertwined with the merits of a civil claim. Unlike the qualified privileges discussed above, courts do not balance the attorney-client privilege against the opposing party's need for the information.<sup>205</sup> Instead, when the privilege applies, it "affords all communications between attorney and client absolute and complete protection from disclosure."<sup>206</sup> Nonetheless, courts addressing attorney-client privilege claims often have to analyze questions of waiver, potentially requiring some analysis of the merits of the privilege claim. For example, a party may waive attorney-client privilege by putting the attorney's conduct into issue, as in a legal malpractice claim.<sup>207</sup> In such a case, the court will not be able to decide whether privilege has been waived without examining the "nature and content" of the plaintiff's claim to determine whether the attorney's conduct is truly at issue in the case.<sup>208</sup> Similarly, courts may have to address exceptions to the privilege, such as the crime-fraud exception that applies when documents sought in discovery "relate to client communications in furtherance of contemplated or ongoing criminal or fraudulent conduct."<sup>209</sup> When the court is asked to apply the crime-fraud exception, parties' underlying claims are often based on the same alleged fraudulent conduct that could support an exception to the privilege.<sup>210</sup> Consequently, the merits of the underlying action would again often be "intertwined" with the privilege claim.

## 2. *Application of the Cohen Doctrine in Criminal Cases*

The *Cohen* doctrine may be more useful in criminal cases than in civil cases, as discovery orders are more likely to satisfy the separability requirement in criminal cases. The U.S. Supreme Court has held that, in a criminal action, *Cohen*'s separability requirement is satisfied if both the issues sought to be appealed can be analyzed separately from the merits of the case—that is, the question of whether the defendant is

---

205. See *In re Allen*, 106 F.3d 582, 600 (4th Cir. 1997).

206. *Id.*

207. *Bittaker v. Woodford*, 331 F.3d 715, 716–17 (9th Cir. 2003).

208. *Koller*, 472 U.S. at 439 (noting that an issue is "entwined with the merits of the litigation" if the court must examine the "nature and content" of the litigation to resolve it); see also *Bittaker*, 331 F.3d at 717.

209. *Marc Rich & Co. A.G. v. United States*, 731 F.2d 1032, 1038 (2d Cir. 1984) (citations omitted).

210. See, e.g., *id.*; see also *Haines v. Liggett Group, Inc.*, 975 F.2d 81, 87 (3d Cir. 1992).

“guilty or innocent of the crimes charged”—and the order is “wholly separate as well from questions concerning trial procedures.”<sup>211</sup> Thus, the Court held in *Sell v. United States*<sup>212</sup> that an order requiring a defendant to take medication in order to become competent to stand trial was an appealable collateral order under the *Cohen* doctrine.<sup>213</sup> Given this holding, and given the limited focus of the “merits” inquiry to questions of guilt or innocence, it is likely that discovery orders will meet the separability requirement in criminal cases.

Once the separability hurdle has been crossed, it is probable that some categories of privilege determinations will be able to meet the remaining *Cohen* requirements in criminal cases. Orders requiring disclosure of allegedly privileged information will generally meet the “finality” requirement, as they “conclusively determine” the question presented.<sup>214</sup> Orders meet *Cohen*’s finality requirement if they “are ‘made with the expectation that they will be the final word on the subject addressed.’”<sup>215</sup> By contrast, orders will fail the finality requirement if they are “the kind of order[s] that . . . a district court ordinarily would expect to reassess and revise . . . in response to events occurring ‘in the ordinary course of litigation.’”<sup>216</sup> An order granting discovery cannot generally be reassessed or revised. As the Ninth Circuit has noted, “once ‘[t]he cat is already out of the bag,’ it may not be possible to get it back in.”<sup>217</sup> Even if disclosed documents are destroyed, people will remember what was in them—information that has been made public can never be truly secret again. Similarly, an order granting discovery will satisfy the unreviewability prong because the dissemination of information cannot be cured on appeal. Regardless of how the appellate court rules, the disclosed information can no longer be made secret, and a later ruling that the information was privileged does not cure the harm from its disclosure.<sup>218</sup>

---

211. *Sell v. United States*, 539 U.S. 166, 176 (2003).

212. 539 U.S. 166 (2003).

213. *Id.* at 176.

214. *Id.*; see also *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546–47 (1949).

215. *Gulfstream Aerospace Corp. v. Mayacamas Corp.*, 485 U.S. 271, 277 (1988) (quoting *Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 12 (1983)).

216. *Id.* (quoting *Moses H. Cone*, 460 U.S. at 13).

217. *Agster v. Maricopa County*, 422 F.3d 836, 838 (9th Cir. 2005) (quoting *Bittaker v. Woodford*, 331 F.3d 715, 718 (9th Cir. 2003)).

218. *Id.*

*Cohen*'s "importance" requirement may be the most difficult for a discovery order to meet in a criminal case, but even this requirement is not likely to be insurmountable for some limited categories of privilege determinations. The U.S. Supreme Court has held that "'important' in *Cohen*'s sense" means being "weightier than the societal interests advanced by the ordinary operation of final judgment principles."<sup>219</sup> The "importance" requirement is more difficult to meet in criminal trials than it is in civil trials because there is a more "compelling interest in prompt trials" in criminal cases.<sup>220</sup> Interest in a speedy trial does not belong to the defendant alone; instead, courts have held that "the public has as great an interest in a prompt criminal trial as has the defendant."<sup>221</sup> Consequently, the U.S. Supreme Court has concluded that the "rule of finality has particular force in criminal prosecutions because 'encouragement of delay is fatal to the vindication of the criminal law.'"<sup>222</sup>

Even given the strictness of the "importance" requirement in criminal cases, however, it may be satisfied in certain circumstances. In *Sell*, for example, the U.S. Supreme Court held that an order requiring a criminal defendant to be forcibly medicated in order to become competent to stand trial could be immediately appealed;<sup>223</sup> the Court noted that "involuntary medical treatment raises questions of clear constitutional importance."<sup>224</sup> The Court has also allowed the immediate appeals of denials of motions to reduce bail,<sup>225</sup> denials of motions to dismiss for double jeopardy,<sup>226</sup> and denials of motions to dismiss under the Speech or Debate Clause.<sup>227</sup> In each of these cases, the Court determined that the importance of the rights asserted outweighed the delay caused by the interlocutory appeal.

Based on the U.S. Supreme Court's prior jurisprudence, it seems likely that certain categories of discovery orders could meet the *Cohen* requirements in criminal cases. A defendant's claim of attorney-client

---

219. *Digital Equip. Corp. v. Desktop Direct*, 511 U.S. 863, 879 (1994).

220. *Flanagan v. United States*, 465 U.S. 259, 265 (1984).

221. *United States v. Gambino*, 59 F.3d 353, 360 (2d Cir. 1995).

222. *United States v. MacDonald*, 435 U.S. 850, 853-54 (1978) (quoting *Cobbledick v. United States*, 309 U.S. 323, 325 (1940)).

223. *Sell v. United States*, 539 U.S. 166, 176 (2003).

224. *Id.*

225. *Stack v. Boyle*, 342 U.S. 1, 7 (1951).

226. *Abney v. United States*, 431 U.S. 651, 659 (1977).

227. *Helstoski v. Meanor*, 442 U.S. 500, 507 (1979).

privilege, for example, may meet all three requirements. First, a ruling requiring the defendant to disclose allegedly confidential information is final because, once disclosed, the district court cannot reconsider its decision and order that the information be restored to secrecy.<sup>228</sup> Second, the privilege can be analyzed without regard to the defendant's guilt or innocence.<sup>229</sup> Third, the attorney-client privilege protects an important right to confer openly with counsel, and thus implicates the right to the effective assistance of counsel in a criminal case.<sup>230</sup> Finally, the disclosure cannot be corrected on appeal. Even if the appellate court orders a new trial at which the information is not used, the defendant will still be "irremediably disadvantaged by erroneous disclosure," because the prosecutors "'cannot unlearn what has been disclosed to them' . . . [and] are likely to use such material for evidentiary leads, strategy decisions, or the like."<sup>231</sup> Any other categories of privilege deemed sufficiently important to outweigh the risk of a delay in trial might also qualify for interlocutory review under *Cohen*.<sup>232</sup>

#### D. Limitations of Mandamus Review

Some courts have chosen to review disclosure orders through mandamus. For example, when the district court in *Cheney* refused to authorize a discretionary appeal,<sup>233</sup> the U.S. Supreme Court granted mandamus relief.<sup>234</sup> But even though some courts have expanded mandamus review to routinely consider privilege questions, mandamus is not a reliable remedy.

---

228. See *In re Papandreou*, 139 F.3d 247, 251 (D.C. Cir. 1998).

229. Cf. *Sell v. United States*, 539 U.S. 166, 176 (2003) (noting that *Cohen*'s separability requirement is met in a criminal case when a collateral issue does not relate to the question of whether the defendant "is guilty or innocent of the crimes charged").

230. Cf., e.g., *Black v. United States*, 385 U.S. 26, 28–29 (1966); *United States v. Rosner*, 485 F.2d 1213, 1224 (2d Cir. 1973) ("[T]he essence of the Sixth Amendment right is, indeed, privacy of communication with counsel.").

231. *Kelly v. Ford Motor Co.*, 110 F.3d 954, 963 (3d Cir. 1997) (quoting *Chase Manhattan Bank, N.A. v. Turner & Newall, PLC*, 964 F.2d 159, 165 (2d Cir. 1992)) (concluding that "there is no way to unscramble the egg scrambled by the disclosure").

232. See *United States v. MacDonald*, 435 U.S. 850, 853–54 (1978) (noting that the importance prong is the most stringent of the *Cohen* requirements in criminal cases).

233. *Judicial Watch, Inc. v. Nat'l Energy Policy Dev. Group*, 233 F. Supp. 2d 16, 31 (D.D.C. 2002), *rev'd sub nom. Cheney v. U.S. Dist. Court*, 542 U.S. 367, 392 (2004) (holding that the "defendants have not met their burden of establishing that exceptional circumstances justifying interlocutory appeal exist under the standard set forth by § 1292(b)").

234. *Cheney*, 542 U.S. at 392.

Mandamus procedures are designed to handle clear-cut violations of well-established law, not to resolve difficult legal questions. As the Fifth Circuit has pointed out:

[M]andamus . . . is singularly inappropriate to determine the correctness of a controlling question of law "as to which there is substantial ground for difference of opinion." These extraordinary writs are generally directed toward situations so bold and plain that the trial Judge's actions are examined in the light of the presence or lack of an abuse of discretion.<sup>235</sup>

Judge Posner has also expressed concern that mandamus may be overused, asking: "How to cabin this too-powerful writ which if uncabined threatens to unravel the final-decision rule?"<sup>236</sup> Judge Posner's answer to his own question was to "tak[e] seriously the two conditions for the grant of a writ of mandamus": irreparable harm and clear abuse of discretion.<sup>237</sup> It is apparent that some courts have ignored the "clear abuse of discretion" requirement in privilege cases.<sup>238</sup>

#### *E. Summary*

The circuit courts have adopted widely divergent requirements for reviewing disclosure orders, and this circuit split has led to both procedural unpredictability and substantive uncertainty. None of the current approaches, however, appear able to provide a mechanism for consistent review. Parties may reasonably be unwilling to risk severe litigation sanctions, trial courts have been reluctant to certify discretionary appeals, *Cohen's* separability requirements make it inappropriate to resolve privilege questions in civil cases, and mandamus review is inappropriate in cases not presenting a clear-cut abuse of discretion.

#### IV. STRENGTHS AND WEAKNESSES OF PROPOSED STATUTE OR RULE CHANGES

The confusion over interlocutory review has not gone unnoticed. Commentators seem to agree that the methods of interlocutory review are inadequate and that courts need to adopt a new approach if litigants

---

235. *Ex parte Tokio Marine & Fire Ins. Co.*, 322 F.2d 113, 115 (5th Cir. 1963).

236. *In re Rhone-Poulenc Rorer Inc.*, 51 F.3d 1293, 1295 (7th Cir. 1995).

237. *Id.*

238. *See supra* notes 143–160 and accompanying text.

are to be given an effective remedy for erroneous disclosure orders.<sup>239</sup> Each of these proposals offers suggestions for improvement, but none of the proposals meet all three of the basic goals of appellate review—(1) increasing the probability of a correct judgment; (2) providing uniformity of result; and (3) increasing litigants’ sense that their dispute has been fully and fairly heard—without imposing unmanageable burdens on the judicial system.<sup>240</sup>

Proposals seeking to clarify and unify interlocutory review tend to require changes in a statute or rule.<sup>241</sup> They also tend to fall into one of two broad categories: (1) increasing the number of appeals allowed as of right,<sup>242</sup> or (2) allowing the circuit courts full discretion over interlocutory appeals.<sup>243</sup> Some proposals include a combination of the two categories.

#### A. *Additional Appeals as of Right*

Some scholars have recommended that the U.S. Supreme Court adopt rules allowing appeals as of right in certain categories of cases.<sup>244</sup> Professor Timothy Glynn, for example, has recommended adopting a rule that would allow an appeal as of right for some categories of cases, potentially including “certain orders that deny protection for allegedly privileged or otherwise protected communications or information.”<sup>245</sup> He notes that privilege determinations comprise a “problem area . . . governed by unclear legal standards and encompass[ing] orders

---

239. See *infra* Parts IV.A. and IV.B.

240. Michael E. Solimine, *Revitalizing Interlocutory Appeals in the Federal Courts*, 58 GEO. WASH. L. REV. 1165, 1175 (1990); see also Rosenberg, *supra* note 37, at 642.

241. See *infra* Parts IV.A. and IV.B.

242. Glynn, *supra* note 179, at 262; Turk, *supra* note 20, at 1038.

243. A.B.A. COMM’N ON STANDARDS OF JUDICIAL ADMIN., STANDARDS RELATING TO APPELLATE COURTS § 3.12 (1977) [hereinafter ABA STANDARDS]; John C. Nagel, Note, *Replacing the Crazy Quilt of Interlocutory Appeals Jurisprudence with Discretionary Review*, 44 DUKE L.J. 200 (1994); Solimine, *supra* note 240; Robert J. Martineau, *Defining Finality and Appealability by Court Rule: Right Problem, Wrong Solution*, 54 U. PITT. L. REV. 717, 747 (1993); Howard B. Eisenberg & Alan B. Morrison, *Discretionary Appellate Review of Non-Final Orders: It’s Time to Change the Rules*, 1 J. APP. PRAC. & PROCESS 285, 301 (1999).

244. The U.S. Supreme Court has this power under 28 U.S.C. § 1292(e), which provides that “[t]he Supreme Court may prescribe rules, in accordance with section 2072 of this title [28 U.S.C.], to provide for an appeal of an interlocutory decision to the courts of appeals that is not otherwise provided for under subsection (a), (b), (c), or (d).”

245. Glynn, *supra* note 179, at 259.



that usually inflict severe irreparable harm.”<sup>246</sup> Broadened mandatory review, he asserts, “will immediately increase error correction and harm avoidance opportunities, and significant, even-handed appellate attention over time will make governing standards within the area clearer, thereby reducing the frequency of error.”<sup>247</sup>

It may be true that mandatory review of privilege determinations could increase error correction and avoid the irreparable harm caused by an erroneous order requiring disclosure. But the harm caused by allowing appeals of right of every potentially erroneous disclosure order almost certainly outweighs the benefit of increased error correction. Currently, the district courts deal with many more claims of privilege than the appellate courts do, and develop and apply legal principles long before the circuit courts have a chance to do so.<sup>248</sup>

Injecting appellate courts into the routine review of privilege rulings will therefore have a significant impact on the workload of those courts—and the amount of increased work will not necessarily be offset by a reduction in appeals caused by the clarification of privilege law. Under most of the current modes of review, courts can consider the importance of a particular issue before deciding whether interlocutory review will be available.<sup>249</sup> Taking the importance prong out of the equation will open the appellate courts to a much wider group of appeals. If, for example, privilege rulings are repeatedly appealed not because there is disagreement over a fundamental legal principle, but rather because the parties merely disagree with the district court’s findings of fact or application of the law, then appellate courts might find themselves in the very situation the Second Circuit warned of—engaged in relatively insignificant “housekeeping” matters that detract from the amount of time available to consider more compelling questions.<sup>250</sup> In this situation, an appeal of right would be an overinclusive remedy; although it might catch and correct some important errors, it would likely sweep too many cases into its scope, and thus create a bigger burden than exists under the current system.

---

246. *Id.*

247. *Id.*

248. See Kenneth S. Broun, *Giving Codification a Second Chance—Testimonial Privileges and the Federal Rules of Evidence*, 53 HASTINGS L.J. 769, 786 n.123 (2002) (noting that district courts had applied—and rejected—one circuit’s interpretation of the attorney-client privilege before other circuits had a chance to consider it).

249. See *supra* Parts II.B., II.C., and II.D.

250. *Am. Express Warehousing, Ltd. v. Transamerica Ins. Co.*, 380 F.2d 277, 280 (2d Cir. 1967).

Furthermore, even if an appeal of right could be limited to certain frequently questioned categories, it would still be difficult to define each category “broadly enough to capture the entire problem area, yet narrowly enough not to impose an unmanageable additional burden on circuit courts.”<sup>251</sup> With regard to privilege determinations, it is probably impossible to identify a category that “capture[s] the entire problem area” without “impos[ing] an unmanageable additional burden.”<sup>252</sup> Consequently, categorical limitations of privilege appeals are unlikely to solve the overinclusivity problems described above, and may even inject a significant element of underinclusivity. Examining the privilege cases that appellate courts have previously found worthy of interlocutory review, it is clear that these cases range over a number of broad subject areas, including attorney-client privilege,<sup>253</sup> trade secrets,<sup>254</sup> governmental privilege,<sup>255</sup> and others.<sup>256</sup> A rule that was limited to only one of these categories would be significantly underinclusive, because it would leave out many cases in which the risk of irreparable harm is just as high, and in which the need to settle the law is just as great. At the same time, a rule allowing appeal in even one category may still be overinclusive; it is unlikely that every order requiring disclosure of an alleged trade secret, for example, is worthy of immediate review.<sup>257</sup>

### *B. Lodging Discretionary Review in the Circuit Courts*

Given the difficulties with defining possible categories for appeals as of right, it is not surprising that a number of scholars and practitioners have instead recommended that courts retain some discretion over which cases they review. Because the district courts’ reluctance to certify discretionary appeals has limited the use of § 1292(b), scholars have recommended removing district courts from the equation and instead providing the circuit courts with greater discretion over selecting which

---

251. Glynn, *supra* note 179, at 261.

252. *Id.*

253. *Kelly v. Ford Motor Co.*, 110 F.3d 954, 963 (3d Cir. 1997).

254. *Smith v. BIC Corp.*, 869 F.2d 194, 199 (3d Cir. 1989).

255. *United States v. Nixon*, 418 U.S. 683, 691 (1974).

256. *Baldrige v. Shapiro*, 455 U.S. 345, 361 (1982) (census data privilege); *Agster v. Maricopa County*, 422 F.3d 836, 839 (9th Cir. 2005) (peer review privilege); *Userly v. Ritter*, 547 F.2d 528, 529 (10th Cir. 1977) (informers’ privilege).

257. *See, e.g., Griego v. Ford Motor Co.*, 19 F. Supp. 2d 531, 533 (D.S.C. 1998) (concluding that there was no basis to dispute that the discovery at issue was not protected by South Carolina’s Trade Secrets Act).

interlocutory appeals to hear.<sup>258</sup> The American Bar Association (ABA), for example, has proposed a discretionary system that entirely excludes district courts from the decision of whether a matter is appropriate for interlocutory review, simply lodging complete discretionary review with the appellate courts.<sup>259</sup> Professors Eisenberg and Morrison have written in support of the ABA proposal, concluding that it offers a solution to the recalcitrance of district courts to certify discretionary appeals when “interlocutory appeals are appropriate but not now available.”<sup>260</sup>

In theory, fully discretionary review would be preferable to mandatory review because it would be neither underinclusive nor overinclusive; the circuit courts could choose to hear only the cases in which the threat of irreparable harm is greatest, and in which the district courts are in need of the most guidance. In practice, however, discretionary review is likely to create nearly as large a burden on appellate courts as mandatory review; the courts would need to review every request for review, even those that are subsequently denied. With discretionary review available in potentially every case involving privilege claims, it is likely that a large number of petitions for discretionary review would be filed with each circuit court.

Eisenberg and Morrison suggest that the courts’ workload should not increase too dramatically because “there will be no law to research, and the judges . . . should be able to read the papers quite quickly and make an informed judgment about whether the case warrants an exception to the final judgment rule.”<sup>261</sup> However, this approach dismisses too quickly the impact that such a discretionary system would have on the appellate court’s workload; it seems unrealistic, at the least, to think that there would be “no law to research.” A prime example of the research that judges would still need to do can be seen in the appeals of class-action certification orders, where the appellate courts have been given

---

258. Either a rule change or an amendment to the discretionary appeal statute, 28 U.S.C. § 1292(b), could accomplish this goal. See Solimine, *supra* note 240, 1209–12.

259. ABA STANDARDS, *supra* note 243, § 3.12, at 25. Wisconsin currently follows this approach: A judgment or order not appealable as a matter of right under sub. (1) may be appealed to the court of appeals in advance of a final judgment or order upon leave granted by the court if it determines that an appeal will: (a) Materially advance the termination of the litigation or clarify further proceedings in the litigation; (b) Protect the petitioner from substantial or irreparable injury; or (c) Clarify an issue of general importance in the administration of justice.

WIS. STAT. § 808.03(2) (2005).

260. Eisenberg & Morrison, *supra* note 243, at 301.

261. *Id.* at 302.

full discretion to determine which cases to hear.<sup>262</sup> Even if there were no statutes or rules actually restricting the appellate court's choice of which cases to decide on interlocutory appeal, the judges would still do significant amounts of research in determining whether the case merits the court's discretionary review.<sup>263</sup> For example, the judges would be likely to research whether the case presented a scenario that arose frequently, and whether courts had previously handled the matter inconsistently. Furthermore, the courts would be likely to do at least some research into the merits of the underlying privilege claim; if the appellate court believed the district court to be correct on the merits, there would be less incentive to grant review. Most commentators agree that appellate judges are diligent and take their responsibilities seriously;<sup>264</sup> consequently, the additional workload even in a fully discretionary system is likely to be greater than suggested by its proponents.

Finally, the existence of complete discretion may preclude uniformity among the circuits. If there is truly "no law" restricting "whether [a] case warrants an exception to the final judgment rule," then each circuit court would be likely to apply its own criteria for choosing cases to review. Without statutory or rule-based guidelines to establish uniformity, it is likely that those criteria would differ among the circuits. Lacking guidelines, the U.S. Supreme Court could not review the choices made by circuit courts, thus rendering the circuit courts' decisions effectively unreviewable and irreversible.<sup>265</sup> Thus, while the appellate courts might ensure that there was uniformity within a circuit, they would be unable to ensure that there would be uniformity among the circuits; in that situation, just as under the current split, some litigants would have

---

262. See FED. R. CIV. P. 23(f).

263. See, e.g., *In re Lorazepam & Clorazepate Antitrust Litig.*, 289 F.3d 98, 102–06 (D.C. Cir. 2002); *Sumitomo Copper Litig. v. Credit Lyonnais Rouse, Ltd.*, 262 F.3d 134, 138–43 (2d Cir. 2001); *Prado-Steiman ex rel. Prado v. Bush*, 221 F.3d 1266, 1272–75 (11th Cir. 2000); *Waste Mgmt. Holdings, Inc. v. Mowbray*, 208 F.3d 288, 293–95 (1st Cir. 2000). These cases all included significant legal research in determining whether to exercise the court's discretion to allow an interlocutory appeal under Rule 23(f) of the Federal Rules of Civil Procedure.

264. See, e.g., David Greenwald and Frederick A.O. Schwarz, Jr., *The Censorial Judiciary*, 35 U.C. DAVIS L. REV. 1133, 1166 (2002) (noting that federal appellate judges are "qualified and hard-working," and pointing out that the average judge authors approximately "54 published majority opinions each year").

265. See Rosenberg, *supra* note 21, at 638–41.

access to interlocutory review and relief that others did not, based only on geographic location.<sup>266</sup>

### C. *Combining Categorization with Discretion*

Another possible solution is to combine increased discretion with an increase in the number of categories in which a litigant may take an interlocutory appeal. Professor Glynn has suggested such an approach in his proposal to amend the rules of civil procedure to combine categories of potential interlocutory appeals with discretionary review.<sup>267</sup> Under this proposal, the rules would include expanded categories for interlocutory appeals, as described above. However, rather than providing an appeal of right for cases falling within those categories, there would instead be only a discretionary appeal. Specifically, the district court would certify an interlocutory appeal when the law is “unsettled within the circuit” and “necessary to the disposition” of the interlocutory order.<sup>268</sup> The district court’s certification order would be “subject to abuse of discretion review” by the appellate court, which would “provide some check” against the district court’s disincentive to certify an interlocutory appeal.<sup>269</sup> Professor Glynn argues that it would give the district court “narrower” and “clearer” criteria to consider when making the certification decision.<sup>270</sup>

This proposal avoids the workload pressures that would be created by lodging full discretion in the appellate courts. If the categories of appealable orders are defined broadly enough—for example, if a category is created to encompass all orders that “deny protection for allegedly privileged or otherwise protected communications or information,”<sup>271</sup>—then a district court’s exercise of its discretion can be targeted at the particular disclosure orders that warrant review. At least within the enumerated categories, litigants would have a uniform method of review and courts would have only a limited increase in their workloads.

Although this proposal could achieve greater uniformity in providing appellate review of discovery orders, it does have a number of

---

266. *See supra* Part III.

267. Glynn, *supra* note 179, at 262.

268. *Id.*

269. *Id.* at 264.

270. *Id.*

271. *Id.* at 259.

drawbacks. First, the requirement that the law be “unsettled within the circuit”<sup>272</sup> ignores the possibility that the law may be unsettled among the circuits—and thus excludes the possibility that the U.S. Supreme Court might ultimately review the order. Second, and more important, the proposal requires a rule change, but offers little benefit that is not already found in the § 1292(b) discretionary appeal. It is argued that the proposal allows the appellate court to review the district court’s certification decision for an abuse of discretion.<sup>273</sup> However, as I discuss below, the current statutory scheme also allows such appellate review of § 1292(b) certification orders, but more closely meets the goals of appellate review.<sup>274</sup>

#### *D. Summary*

Scholars have crafted proposals to provide greater interlocutory review of disclosure orders. These proposals include allowing additional appeals as of right, lodging discretionary review in the circuit courts of appeals, and combining appeals of right with appellate court discretionary review. Attempting to define the categories in which an appeal as of right may be taken is a difficult process, and is likely to be both underinclusive (leaving out important categories) and overinclusive (including unimportant cases within a larger category). Lodging complete discretion in the appellate courts is likely to create a significantly burdensome workload. Finally, these proposals all require revisions to the procedural rules; none of them present a feasible solution under the current regulatory scheme.

### V. THE POSSIBILITY OF GREATER UNIFORMITY UNDER THE CURRENT RULES AND STATUTORY SCHEME

I propose that the goals of error correction, uniformity, and fairness can best be met by combining two of the current methods of review—discretionary review and mandamus. No revision to the procedural rules is required. As discussed above, the interlocutory review of privilege determinations is an area sorely in need of unifying principles.<sup>275</sup> However, I do not believe that the statutory or rule changes addressed

---

272. *Id.* at 262.

273. *Id.* at 264.

274. *See infra* Part V.

275. *See supra* Parts III and IV.

above are desirable given their likely impact on the appellate courts' workload and their failure to narrowly address the most pressing privilege issues. Instead, I recommend that appellate courts address the inconsistencies in interlocutory review by taking a different analytic approach to the current scheme—specifically, by using the appellate court's mandamus power to enforce the district court's compliance with the discretionary review statute.

This two-tiered review mechanism need not be applied to review every disclosure order, as the current system appears to address certain cases reasonably well. In the criminal context, for example, interlocutory review is available only rarely, as the right to a speedy trial usually outweighs the benefits of interlocutory review.<sup>276</sup> However, when important rights are in danger of being lost without such review, the *Cohen* collateral order doctrine provides a sufficient safeguard.<sup>277</sup> The current system also works well for situations in which a district court orders disclosure of information without any regard to the law or to guiding principles—this is the type of clear abuse of discretion that mandamus review was established to address.<sup>278</sup>

The current system breaks down, however, in addressing privilege questions of first impression in civil cases—and in these cases, the proposed approach could fill in the gaps and provide consistent appellate review. Appellate courts struggle to find a way to provide immediate review in these cases because: (1) the party ordered to disclose privileged information is likely to be irreparably harmed if review must wait until after a final judgment,<sup>279</sup> and (2) the issue may escape review altogether if the privilege question becomes moot after a final judgment because the information has already been disclosed.<sup>280</sup> However, courts have found that the established methods of interlocutory review do not always work in this category of cases; district courts may fail to certify a discretionary appeal,<sup>281</sup> and *Cohen*'s separability requirement can foreclose appeal under the collateral order doctrine.<sup>282</sup> When the legal issues are unsettled, it can be difficult to conclude that a district court

---

276. See *supra* Part III.C.3.

277. See *supra* Part III.C.3.

278. See *supra* Part II.D; *Cheney v. U.S. Dist. Court*, 542 U.S. 367, 380 (2004).

279. See *supra* Part I.

280. See *supra* Part I.

281. See *supra* Part III.B.

282. See *supra* Part III.C.1.

has committed a “clear abuse of discretion” in attempting to apply the law as the court sees it, and courts may therefore be tempted to dispense with this requirement.<sup>283</sup> Nevertheless, the U.S. Supreme Court has repeatedly stated that such a clear abuse of discretion is a necessary predicate to mandamus review, and its most recent writing on the subject does not suggest that there is an exception for questions of first impression.<sup>284</sup> In spite of these problems, however, I believe that a combination of discretionary appeal and mandamus review can provide a workable solution.

#### *A. Enforcing § 1292(b) Through Mandamus Review*

Section 1292(b), although currently underutilized, provides an excellent mechanism for resolving privilege disputes before final judgment. Parties who believe that the district court made an error of law in a privilege ruling should ask the district court to certify a discretionary appeal, and the circuit courts should encourage the district courts to use this mechanism whenever possible. Section 1292(b) is tailor-made for handling difficult and novel questions of law that would otherwise evade review, and privilege orders can generally meet its requirements.<sup>285</sup>

Scholars have pointed out that the problems with § 1292(b) lie with district courts’ unwillingness to embrace the statute, and not with the statute itself.<sup>286</sup> Therefore, if § 1292(b) is to live up to its potential, the appellate courts must have a mechanism to ensure that district judges are not overly recalcitrant to apply it in appropriate cases.<sup>287</sup> If a disclosure order clearly meets the requirements set out in § 1292(b) and the district court nevertheless refuses to certify it for interlocutory appeal, the appellate court should consider whether the district court has clearly abused its discretion in refusing to certify the case. If the appellate court determines that it has, mandamus review would then be appropriate to ensure that the purpose of § 1292(b) is not thwarted.

In the past, courts have been reluctant to conclude that a district court could ever abuse its discretion by refusing to certify an interlocutory appeal. This reluctance does not derive from the statute itself; the plain

---

283. *See supra* Part II.D.2.

284. *See* *Cheney v. U.S. Dist. Court*, 542 U.S. 367, 380–81 (2004).

285. *See* 28 U.S.C. § 1292(b) (2000).

286. *See* Glynn, *supra* note 179, at 195 (noting that district judges “rarely grant certification under this provision”); Redish, *supra* note 179, at 92.

287. *See supra* Part III.B.



language of § 1292(b) lodges unlimited discretion only in the appellate court, not the district court.<sup>288</sup> The statute provides that the circuit court “may . . . in its discretion, permit an appeal to be taken from such order,” but also provides that “[w]hen a district judge . . . *shall* be of the opinion [that the order meets the appealability criteria], he *shall* so state in writing.”<sup>289</sup> The district court’s “opinion” in this matter cannot be a matter of mere subjective preference, because the statute provides the court a framework by which to make its conclusion: the court must make a legal and factual determination as to: (1) whether there is a “controlling question of law,” (2) whether there is “substantial ground for difference of opinion,” and (3) whether an immediate appeal might “materially advance” the litigation.<sup>290</sup> Thus, the court’s “opinion” is intended to be a reasonable determination about whether the appealability criteria have been met. Nonetheless, some courts have concluded that “the language of section 1292(b)” is “not decisive,” and have therefore ignored the statutory language in favor of legislative history suggesting that “district court judges retain unfettered discretion to deny certification of an order for interlocutory appeal even where the three legislative criteria of section 1292(b) appear to be met.”<sup>291</sup> This legislative history, however, is irrelevant in the face of an unambiguous statute,<sup>292</sup> and the text of the statute simply does not give the district court unlimited discretion.

In fact, the statute offers a carefully crafted mix of direction and discretion. It offers direction by expressing an intent to permit an interlocutory appeal when judicial efficiency would benefit from it, that is, when there is a controlling question of law, a substantial ground for difference of opinion, and the possibility of materially advancing the litigation.<sup>293</sup> Thus, § 1292(b) charges district courts with evaluating the state of the case and making a determination about the likely effect of an

---

288. 28 U.S.C. § 1292(b).

289. *Id.* (emphasis added).

290. *Id.*

291. *Nat’l Asbestos Workers Med. Fund v. Philip Morris, Inc.*, 71 F. Supp. 2d 139, 162 (E.D.N.Y. 1999); *see also In re Cendant Corp. Sec. Litig.*, 166 F. Supp. 2d 1, 13–14 (D.N.J. 2001).

292. *BedRoc Ltd. v. United States*, 541 U.S. 176, 187 n.8 (2004) (“[O]ur longstanding precedents . . . permit resort to legislative history only when necessary to interpret ambiguous statutory text.”); *Conn. Nat’l Bank v. Germain*, 503 U.S. 249, 253–54 (1992) (“We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there. When the words of a statute are unambiguous, then, this first canon is also the last: judicial inquiry is complete.”) (citations and internal quotation marks omitted).

293. 28 U.S.C. § 1292(b).

interlocutory appeal. But it also allows the circuit courts to exercise their discretion in deciding which interlocutory appeals to accept. Thus, if the docket becomes too crowded or if there are other compelling reasons not to accept an interlocutory appeal, an adequate safety valve exists.

Some courts have suggested that the statute's "dual gatekeeper" structure requires the district court also to have unfettered discretion to deny certification, and that "[i]f someone disappointed in the district court's refusal to certify a case under § 1292(b) has only to go to the court of appeals for a writ of mandamus requiring such a certification, there will be only one gatekeeper, and the statutory system will not operate as designed."<sup>294</sup> This view is shortsighted. Allowing the appellate court to review the district court's decision does not create a one-gatekeeper system; instead, it merely allows the second gatekeeper to ensure that the first gatekeeper is functioning adequately and fairly, just as an appellate court does in any case. In fact, if the appellate court cannot review the district court's decision at all, then the dual gatekeeper system truly cannot function, because no matter how derelict the first gatekeeper may be, the second gatekeeper would never have the opportunity to offer its guidance. Judicially creating a second layer of absolute discretion for district courts therefore actually disrupts the balance crafted by the statute, as it allows district courts to cut off the discretionary review mechanism before the appellate court even has a chance to consider whether the case is worthy of immediate review.

Mandamus review is therefore appropriate (1) when the district court concludes that the conditions of § 1292(b) are met but nevertheless refuses to certify the case,<sup>295</sup> or (2) when the state of the record is such that the district court must reasonably conclude that the prerequisites have been satisfied. A few of the circuit courts have expressed a willingness to exercise their mandamus power in this situation,<sup>296</sup>

---

294. *In re Ford Motor Co.*, 344 F.3d 648, 654 (7th Cir. 2002); see also Note, *Interlocutory Appeals in the Federal Courts under 28 U.S.C. § 1292(b)*, 88 HARV. L. REV. 607, 616–17 (1975).

295. For example, in *National Asbestos Workers* the district court was willing to assume without deciding that "section 1292(b)'s explicit requirements [were] satisfied," but nevertheless concluded that certification of an interlocutory appeal was inappropriate because "unique factual and legal issues" required "highly fact specific inquiries." 71 F. Supp. 2d at 166.

296. See *Fernandez-Roque v. Smith*, 671 F.2d 426, 431 (11th Cir. 1982); see also *In re Lott*, 424 F.3d 446, 449 (6th Cir. 2005) ("When there is extraordinary need for review of an order before final judgment and the District Court has refused to certify the issue pursuant to § 1292(b), this Court has authority to issue a writ of mandamus under the All Writs Act."); *In re Ford Motor Co.*, 344 F.3d at 654 ("[W]e have not ruled out the possibility of a writ of mandamus in the § 1292(b) context for a truly egregious situation, if it seemed that the district court was seriously abusing its authority."); *In*

although others have not.<sup>297</sup> When an appellate court does exercise mandamus review after a district court has wrongly refused to certify an appeal, the appellate court need not remand for certification, as this would cause needless delay; instead, the court should proceed directly to consider the merits of the privilege question.<sup>298</sup>

*B. Advantages of Two-Tiered Review Combining a § 1292(b) Appeal with Mandamus Review*

Two-tiered review combining § 1292(b) appeal and mandamus would provide greater uniformity among the circuit courts. It can be applied by courts immediately, it is consistent with the current statutory and common-law scheme, and it would not require any statutory or rule changes. It would also reduce the appellate courts' current reliance on inconsistent remedies, but would not overly burden the courts' already-crowded dockets.

*1. Reducing Reliance on Inconsistent Appellate Remedies*

Enforcing the certification of appropriate § 1292(b) orders through mandamus review would transform § 1292(b) from a significantly underutilized statute into an effective appellate remedy, and would thus allow circuits to minimize some of their current inconsistent approaches to the review of privilege orders. Because there would be an effective option for seeking interlocutory review, parties would not need to face

---

*re* Air Crash Disaster Near New Orleans, 821 F.2d 1147, 1167 (5th Cir. 1987) ("An unsuccessful defendant may seek certification for an interlocutory appeal pursuant to 28 U.S.C. § 1292(b), or if this is denied, the defendant can petition this court for a writ of mandamus.").

297. See *Arthur Young & Co. v. U.S. Dist. Court*, 549 F.2d 686, 698 (9th Cir. 1977); *Green v. Occidental Petroleum Corp.*, 541 F.2d 1335, 1338 (9th Cir. 1976) ("Nor is mandamus to direct the district judge to exercise his discretion to certify the question an appropriate remedy."); *Leasco Data Processing Equip. Corp. v. Maxwell*, 468 F.2d 1326, 1344 (2d Cir. 1972) ("Defendants' request that we mandamus him to certify the issue meets an insurmountable obstacle. Congress plainly intended that an appeal under § 1292(b) should lie only when the district court and the court of appeals agreed on its propriety. It would wholly frustrate this scheme if the court of appeals could coerce decision by the district judge."); *D'Ippolito v. Cities Serv. Co.*, 374 F.2d 643, 649 (2d Cir. 1967) ("Finally, we cannot conceive that we would ever mandamus a district judge to certify an appeal under 28 U.S.C. § 1292(b) in plain violation of the Congressional purpose that such appeals should be heard only when both the courts concerned so desire.").

298. 9 MOORE'S FEDERAL PRACTICE ¶ 110.22[5], at 287 (2d ed. 1996) ("If a § 1292(b) certificate is sought and denied, mandamus will then lie in an appropriate case, not to compel issuance of the certificate, but to review the order for which the certificate was sought."); see also *In re Ford Motor Co.*, 344 F.3d at 654.

the risk of incurring severe or unreviewable sanctions for disobeying a discovery order.<sup>299</sup> Similarly, the circuit courts would not need to stretch the *Cohen* doctrine to allow appeals as of right in privilege cases,<sup>300</sup> but could instead reserve *Cohen* appeals for those orders that are truly separable from the merits.

Courts could also scale back their use of mandamus review in privilege cases, providing such review only when the U.S. Supreme Court's requirement of a "clear abuse of discretion"<sup>301</sup> or "usurpation of power"<sup>302</sup> is satisfied. Ideally, the circuit courts would no longer grant mandamus review just because a disclosure order presented an issue of first impression or created a risk of irreparable harm, but would also consider whether the parties could have sought certification of an interlocutory appeal under § 1292(b). In this manner, courts could reserve mandamus relief for cases in which the district court had either clearly abused its discretion in the first instance by patently ignoring settled law or, conversely, just as clearly abused its discretion by refusing to certify an order presenting an obviously important and unsettled legal question whose resolution would expedite the end of the lawsuit. Adoption of the proposed two-tiered procedure would therefore allow mandamus to be limited only to cases meeting the U.S. Supreme Court's requirements.<sup>303</sup>

## 2. *Minimizing the Appellate Burden*

Implementing a two-tiered system of review would divide the workload between the district court and the appellate court. By seeking a certification order first in the district court, parties will minimize the burden placed on appellate courts—ideally, the appellate courts will not be presented with an interlocutory appeal of a disclosure order until the district court has vetted the issue and determined that it is worthy of immediate review. Even when a party seeks mandamus review of a trial court's refusal to certify an order, the appellate court will have the benefit of a record that establishes what arguments the district court was presented with, and its reasoning for refusing to certify. Because the

---

299. *See supra* Part II.A.

300. *See supra* Part II.C.

301. *Cheney v. U.S. Dist. Court*, 542 U.S. 367, 380 (2004) (quoting *Bankers Life & Cas. Co. v. Holland*, 346 U.S. 379, 383 (1953)).

302. *Id.* (quoting *Will v. United States*, 389 U.S. 90, 95 (1967)).

303. *See id.*

district court would provide the initial screening, the two-tiered system would place less of a burden on the appellate courts than would a system that lodged first-line review in the circuit courts.<sup>304</sup>

### C. *Limitations of Two-Tiered Review*

Even if the appellate courts begin enforcing the certification provisions of § 1292(b), there will still be some privilege orders capable of inflicting irreparable injury that will not be subject to appellate review under this section. First, by its terms, the statute applies only to civil actions,<sup>305</sup> so it would not be available in a criminal case. Second, it would not apply to cases in which the privilege order turns on a factual question, rather than a significant question of law.<sup>306</sup> Finally, because the circuit courts would continue to have unfettered discretion to deny an interlocutory appeal certified by the district court, it is possible that the courts could deny review of important cases due to the crowded condition of appellate dockets.<sup>307</sup>

These limitations are not fatal to the recommendation, however. In criminal cases, interlocutory review is rarely appropriate, and, on the rare occasions that it is, review may be available under the *Cohen* collateral order doctrine.<sup>308</sup> In civil cases where the privilege orders do not meet the “controlling legal issue test,” review may still be occasionally appropriate directly through mandamus<sup>309</sup>—for example, review would be appropriate if the district court simply ignored clearly binding precedent in ordering that documents be disclosed.<sup>310</sup>

Even under the proposed system, however, there will be some cases in which the harm caused by an erroneous privilege order still goes unredressed, especially if the privilege determination is particularly fact-based. For example, a trial court’s determination that a party failed to

---

304. See *supra* Part IV.B.

305. 28 U.S.C. § 1292(b) (2000).

306. *Id.*

307. See *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 475 (1978) (“The appellate court may deny the appeal for any reason, including docket congestion.”).

308. See *supra* Part II.C.3.

309. *Hahnemann Univ. Hosp. v. Edgar*, 74 F.3d 456, 462 n.5 (3d Cir. 1996) (“It is conceivable that mandamus might be appropriate in a case not satisfying the section 1292(b) certification standard. Thus, we have not imposed an inflexible requirement that certification be sought and, if granted, leave to appeal be sought before a writ of mandamus may issue.” (internal citations omitted)).

310. *In re Pioneer Hi-Bred Int’l, Inc.*, 238 F.3d 1370, 1376 (Fed. Cir. 2001).

introduce factual evidence to support the existence of a privilege may be unreviewable under either § 1292(b), mandamus, or the *Cohen* collateral order doctrine.<sup>311</sup> However, such fact-based cases do not present the type of issues that have currently divided the circuits and, in fact, are also likely to go unreviewed in the current system.<sup>312</sup> Leaving some cases unreviewed does not conflict with the purpose of the proposal; the point is not to increase the total number of disclosure orders reviewed, but is instead to provide greater consistency in those that are reviewed. Under the proposed system, courts of appeals might review the same total number of cases. But in cases like *Agster* and *Cheney*, when the appellate courts are determined to provide some type of interlocutory review, they would have a consistent method by which to do so without stretching the limits of the collateral order doctrine or mandamus doctrine. In addition, many of the decisions that would go unreviewed under both the current system and the proposed system depend on questions of fact, and are thus unlikely to settle important questions of law. The burden of reviewing such cases would appear to exceed the benefits.<sup>313</sup> Consequently, the exclusion of such cases is not likely to diminish the benefits of the proposed two-tiered system of review.

#### D. Summary

In the past, litigants have been unable to rely on discretionary appeals to remedy erroneous disclosure orders because the district courts have been reluctant to certify such appeals, even in cases where the appellate courts later determined that review was warranted. This Article recommends that appellate courts use their mandamus powers to ensure that district courts certify discretionary appeals when a disclosure order meets the requirements of the discretionary appeal statute and thus qualifies for interlocutory review. This two-tiered system of review does not require a statute or rule change, and does not require stretching the boundaries of the *Cohen* collateral order doctrine or mandamus review in order to provide review of privilege claims. It does, however, further

---

311. See *In re Toy*, 102 F. App'x 657, 658 (Fed. Cir. 2004) (denying mandamus relief in a fact-specific case that would also be unlikely to qualify for review under the proposed two-tiered system).

312. See, e.g., *id.*

313. *Reise v. Bd. of Regents of Univ. of Wis. Sys.*, 957 F.2d 293, 295 (7th Cir. 1992) (noting that, for the typical discretionary discovery order, "the costs of delay via appeal, and the costs to the judicial system of entertaining these appeals, exceed in the aggregate the costs of the few erroneous discovery orders that might be corrected were appeals available").

the goals of appellate review—it provides a second level of review, thus allowing reversal of erroneous orders; it enhances consistency and uniformity, as its reliability reduces the incentive for appellate courts to reach for often-conflicting methods of review; and it increases the perception of fairness, as litigants' privilege claims can be fully aired and reviewed before disclosure. Moreover, because the district courts provide the first level of review, the two-tiered system is unlikely to impose an unmanageable burden on the appellate docket.

## CONCLUSION

Litigants face a difficult situation when a district court orders them to disclose information they believe to be privileged or confidential. While other claims can be reviewed after final judgment, privilege claims cannot wait, and must be reviewed before the information is disclosed. The current approaches to interlocutory review, however, are both haphazard and ineffective. This Article therefore proposes a system of two-tiered review to remedy the harm caused by erroneous disclosure orders without stretching the current system of interlocutory review so far that the benefits of the final judgment rule become lost. Review should begin in the district court with a motion to certify a discretionary appeal under 28 U.S.C. § 1292(b). If the district court refuses to certify an order in spite of the fact that it clearly satisfies the requirements of § 1292(b), then the appellate court may exercise its mandamus power to review the case. This two-tiered system of review would provide a consistent mechanism by which the most difficult and important privilege orders could be immediately reviewed, but would not impose too heavy a burden on the already-crowded appellate dockets.